(23)

No. 04-1697
Vide 04-1528, 04-1530
Title: William H. Sorrell, et al., Petitioners
v.
Neil Randall, et al.
Docketed: June 17, 2005
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (00-9159, 00-9180, 00-9231, 00-9239, 00-9240)
Decision Date: August 18, 2004
Rehearing Denied: February 11, 2005
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 14 2005	Petition for a writ of certiorari filed. (Response due July 18, 2005)
Aug 3 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Petition GRANTED The petition for a writ of certiorari in No. 04-1528 is granted. The petition for a writ of certiorari in No. 04-1530 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Oct 21 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 14, 2005. VIDED.
Oct 28 2005	Consent to the filing of amicus briefs in support of either party received from counsel for respondents/conditional cross petitioners William H. Sorrell, et al. VIDED.
Nov 23 2005	Extension of time within which to file respondents' brief on the merits to and including February 8, 2006. VIDED.
Nov 30 2005	SET FOR ARGUMENT on Tuesday, February 28, 2006.
Dec 13 2005	Joint appendix filed. VIDED.
Dec 14 2005	Brief of petitioners in 04-1530, Vermont Republican State Committee filed. VIDED.
Dec 14 2005	Brief amicus curiae of Mitch McConnell filed. VIDED.
Dec 14 2005	Brief amicus curiae of Republican National Committee filed. VIDED.
Dec 14 2005	Brief amicus curiae of Center for Competitive Politics, et al. filed. VIDED.
Dec 20 2005	CIRCULATED.
Dec 27 2005	Motion for divided argument filed by respondent Randall, et al. and Vermont Republican State Committee, et al. VIDED.
Jan 11 2006	Application (05A643) of Sorrell, et al. and Vermont Public Interest Research Group, Inc., et al. to file response briefs on the merits in excess of page limits, submitted to Justice Ginsburg.
Jan 18 2006	Motion for additional time to argue filed by petitioner William H. Sorrell, et al. VIDED.
Jan 23 2006	Motion for divided argument filed by petitioners DENIED.
Jan 23 2006	The motion of respondents for additional time for oral argument is DENIED. The motion of respondents for divided argument is GRANTED and the time is to be divided as follows: 20 minutes for respondents Sorrell, et al. and 10 minutes for respondents Vermont Public Interest Research Group, et al.
Feb 7 2006	Brief amicus curiae of ReclaimDemocracy.Org filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Secretaries of State of New Hampshire, New Mexico, Oregon, and

	Wisconsin filed. VIDED. (Distributed)
Feb 8 2006	Brief amicus curiae of Center for Democracy and Election Management filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of TheRestofUs.Org, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief of respondents/ cross-petitioners William H. Sorrell, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief of respondents / cross-petitioners Vermont Public Interest Research Group, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Current and Former State Court Justices and Judges filed. (Distributed)
Feb 8 2006	Brief amici curiae of Equal Justice Society, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of John McCain, Russell Feingold, Christopher Shays, and Martin Meehan filed. VIDED. (Distributed)
Feb 8 2006	Brief amicus curiae of Democratic National Committee filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Bill Bradley and Alan Simpson filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Connceticut, et al. filed. VIDED. (Distributed)
Feb 10 2006	Motion for leave to file amici brief out of time filed by Norman Dorsen, et al. VIDED. (Distributed)
Feb 20 2006	Reply of petitioners Vermont Republican State Committee, et al. filed. VIDED. (Distributed)
Feb 27 2006	Motion for leave to file amicus brief filed by Norman Dorsen, et al GRANTED.
Feb 28 2006	Argued. For petitioners: James Bopp, Jr., Terre Haute, Ind. For respondents: Sorrell, et al: William H. Sorrell, Attorney General, Montpelier, Vt. For respondent: Vermont Public Interest Research Group, Brenda Wright, Boston, Mass.

Supreme Court, U.S.
FILED
JUN 14 2005
OFFICE OF THE CLERK

No. 04-041697

In the
SUPREME COURT OF THE UNITED STATES

WILLIAM H. SORRELL, *ET AL.*,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
CONDITIONAL-CROSS-PETITIONERS,

v.

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
CONDITIONAL-CROSS-RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Conditional Cross-Petition Respondents*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc.; Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Conditional Cross-Petition Respondents*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Conditional-Cross-Petitioners*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Conditional-Cross-Petitioners.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight, Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, The Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; and Rural Vermont state that they have not issued shares to the public and no parent companies, subsidiaries, or affiliates of any of them have issued shares to the public.

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend I i,2,3,4

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28 U.S.C. §1254(1) 2

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CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

Pursuant to Supreme Court Rule 12.5, William H. Sorrell, Attorney General of the State of Vermont, *et al.*, and Vermont Public Interest Research Group, Inc., *et al.*, respectfully submit this Conditional Cross-Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. This Conditional Cross-Petition is contingent upon the Court granting a writ of *certiorari* on the issue of the constitutionality of Vermont's candidate expenditure limits, which is presented as Question One in the Petitions for Writs of *Certiorari* filed in Nos. 04-1528 and 04-1530.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is reported at 382 F.3d 91 (2nd Cir. 2004). It is reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 90a-312a. The opinion of the United States District Court for the District of Vermont is reported at 118 F. Supp. 2d 459 (D. Vt. 1999). It is reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 21a-89a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Petitions for rehearing *en banc* were denied on February 11, 2005. App. 313a-314a. The order denying rehearing *en banc* was amended on April 11 (App. 315a-344a), and again on April 18 and May 11, 2005 (filed with the Court by counsel of record in No. 04-1528). The Petition for Writ of *Certiorari* in No. 04-1528 was placed on this Court's

docket on May 16, 2005. The Petition for Writ of *Certiorari* in No. 04-1530 was placed on this Court's docket on May 17, 2005. The Conditional Cross-Petition is timely pursuant to Rule 12.5 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

1997 Vt. Laws P.A. 64, §2805a ("Act 64") (codified at 17 V.S.A. §2805a and reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 6a-7a).

STATEMENT OF THE CASE

The Court is respectfully referred to the Statement of the Case found in the Response and Partial Opposition of Respondents William H. Sorrell, *et al.*, in Nos. 04-1528 and 04-1530, which is incorporated here by reference.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The first Question Presented in the Petitions for Writs of *Certiorari* in Nos. 04-1528 and 04-1530 seeks review of the Second Circuit's ruling below, which concluded that Vermont's candidate expenditure limits, 1997 Vt. Laws P.A. 64, §2805a ("Act 64") (codified at 17 V.S.A. §2805a and reproduced in the Appendix to the Petition for Writ of *Certiorari* in *Neil Randall, et al. v. William H. Sorrell, et al.*, No. 04-1528, at App. 6a-7a), were permissible under the First Amendment and that the interests of deterring corruption and its appearance, and in protecting officials from the rigors of fundraising so that they could focus upon their duties, were sufficiently compelling to justify such limits.

In response to those Petitions, Respondents William H. Sorrell, *et al.* and Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.*, agreed that there is a division among the Circuits as to the constitutionality of expenditure limits and argued that the Second Circuit had correctly upheld such limits in light of this Court's precedents. Respondents and Respondent-Intervenors further asserted that additional compelling interests, different constitutional analyses, and alternative narrow tailoring analyses not examined by the Second Circuit also supported the ruling below. Respondents and Respondent-Intervenors concluded, however, that review by this Court at this time is

necessary and appropriate to resolve the split among the Courts of Appeals and to bring clarity to this recurring issue of national importance.

In the event the Court issues a writ of *certiorari* as to Question One in either No. 04-1528 or No. 04-1530, it should also grant this Conditional Cross-Petition. Conditional Cross-Petitioners state that there are additional compelling interests, different constitutional analyses (including reconsideration of the standards set out in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)), and alternative narrow tailoring analyses that the Court could choose to employ in evaluating expenditure limitations under the First Amendment. These arguments are more fully set out in the Response and Partial Opposition of Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.*, in Nos. 04-1528 & 04-1530 (the "Partial Opposition"), at Section I(C)(3), which is incorporated here by reference.

Cross-Petitioners believe that the above-referenced arguments will properly be before the Court upon a grant of review as to Question One set forth in the Petitions in Nos. 04-1528 or 04-1530, because these arguments provide alternative grounds for upholding the judgment of the Second Circuit. Nevertheless, they have filed this Conditional Cross-Petition to assure that the Court can give full examination to all constitutional justifications for candidate spending ceilings and can afford relief in excess of that granted by the Second Circuit.

In light of the fact that the Court has not considered candidate expenditure limits in over 30 years, that a number of Justices of this Court have expressed concerns over the constitutional standards enunciated in *Buckley* regarding such limits, *see* Partial Opposition at Section I(B) n.5, and that the propriety of spending limits is an

issue of great public concern, the Court should grant this Conditional Cross-Petition to allow complete and thorough consideration of this issue.

CONCLUSION

If the Petition for Writ of *Certiorari* in either No. 04-1528 or No. 04-1530 is granted as to Question One, this Conditional Cross-Petition also should be granted.

Respectfully submitted,

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FILED
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SUPREME COURT, U.S.

(29) (28) (17)

Nos. 04-1528, 04-1530, 04-1697

In the Supreme Court of the United States

NEIL RANDALL, ET AL.,

v.

WILLIAM H. SORRELL, ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL.,

v.

WILLIAM SORRELL, ET AL.

WILLIAM H. SORRELL, ET AL., AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, ET AL.,

v.

NEIL RANDALL, ET AL., AND VERMONT REPUBLICAN
STATE COMMITTEE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitions for Writ of Certiorari Filed: May 11, 2005 (04-1528), May 12, 2005 (04-1530), June 14, 2005 (04-1697)
Certiorari Granted: September 27, 2005

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

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District Court Opinion (8/10/2000)	21a
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Denial of Petition for Rehearing En Banc (2/11/2005)	313a
Second Amended Denial of Petition for Rehearing En Banc; Concurring and Dissenting Opinions (4/11/05)	315a

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[1]The opinions of Judges Calabresi and Raggi were filed on May 11, 2005; thus, they were not included with the other Denial of Rehearing opinions printed in the Appendix to the Petition for Certiorari at 315a.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Docket Nos. 2:99-cv-146, 2:99-cv-234, 2:00-cv-57

MARCELLA LANDELL, et al., *Plaintiffs,*
NEIL RANDALL, et al., *Plaintiffs,* and
VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants* and
VERMONT PUBLIC INTEREST RESEARCH GROUP,
et al., *Defendants-Intervenors*

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/1999	---	ENDORSED ORDER: granting [28-1] motion to Consolidate Cases (2:99-cv-146 & 2:99-cv-234), consolidated lead case (Judge William K. Sessions III) Cy to parties (pjd) (Entered: 10/22/1999)
03/21/2000	84	ORDER consolidating case with 2:00-CV-57 (copy of original P#28 in 2:00-CV-57), consolidated lead case (Judge William K. Sessions III)

DATE	DOCKET NUMBER	PROCEEDINGS
		[EOD Date 3/21/00] Cy to parties (pjd) (Entered: 03/21/2000)
04/07/2000	---	MINUTE ENTRY: by Judge William K. Sessions III ***** ORDERED: cases remain consolidated, however; court trial will go forward on 5/8 through 5/17 with fact witnesses only; court trial will continue on 5/31 & 6/1 with expert witnesses *****
08/10/2000	130	OPINION AND ORDER 1) Act 64's contribution limits to candidates are constitutional; 2) Act 64's expenditure limits are unconstitutional; 3) Act 64's 25% limit on out-of-state funds is unconstitutional; 4) Act 64's $2000 limit on contributions to political parties is constitutional; 5) Act 64's $2000 limit on contributions to political committees and its various limits on contributions by political committees to candidates is constitutional; 6) Act 64's regulation of related expenditures is

DATE	DOCKET NUMBER	PROCEEDINGS
		constitutional as it relates to candidate contributions but unconstitutional as it relates to candidate expenditures; 7) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned within this order against pltfs (Judge William K. Sessions III) Cy to parties (law) Modified on 08/14/2000 (Entered: 08/10/2000)
08/10/2000	131	**VACATED - SEE P#168** JUDGMENT (Judge William K. Sessions III) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned against pltfs case closed Cy to parties (law) Modified on 08/14/2000 Modified on 2/24/2005 (jse). (Entered: 08/10/2000)
09/11/2000	136	NOTICE OF APPEAL by intervenors-defendants VT Public Int Rsrch, League Women Voters, Rural Vermont, Vt OWL, Vt Alliance Consv, Mike Fiorillo, Marion Grey, Phil Hoff, Frank

DATE	DOCKET NUMBER	PROCEEDINGS
		Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, Maria Thompson re: [131-1] judgment. *****
09/11/2000	138	NOTICE OF APPEAL by defendants William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand re: [131-1] judgment *****
09/22/2000	146	NOTICE OF CROSS-APPEAL by plaintiffs Donald R. Brunelle, VRLC-PC, VRLC-FIPE re: [131-1] judgment *****
09/22/2000	147	NOTICE OF CROSS-APPEAL by plaintiff VT Republican Comm re: [131-1] judgment. *****

DATE	DOCKET NUMBER	PROCEEDINGS
09/25/2000	148	NOTICE OF CROSS-APPEAL by plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, Vt Libertarian Party re: [131-1] judgment. *****
02/22/2005	168	MANDATE of USCA re: judgment of district court is AFFIRMED in part, VACATED in part, and REMANDED for further proceedings in accordance with the opinion of this Court. (Opinion not scanned; available for viewing at the Burlington Clerk's Office) Each party shall bear its own costs on this appeal. RE: [148] Notice of Appeal filed by Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, The Vermont Libertarian Party; [147] Notice of Appeal filed by Vermont Republican State Committee; [138] Notice of Appeal filed by Vincent Illuzzi, William Wright, William H. Sorrell, John T. Quinn, Dale O. Gray,

DATE	DOCKET NUMBER	PROCEEDINGS
		Lauren Bowerman, James Hughes, Joel W. Page, James D. McNight, James P. Mongeon, Terry Trono, Dan Davis, George E. Rice, Keith W. Flynn, Robert L. Sand; [136] Notice of Appeal filed by Vermont Public Interest Research Group, Cheryl Rivers, Rural Vermont, League of Women Voters of Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Maria Thompson; [146] Notice of Appeal filed by Donald R. Brunelle, Vermont Right to Life Committee--Political Committee, Vermont Right to Life Committee--Fund for Independent Political Expenditures. (cwb) (Entered: 02/22/2005)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-9159 (Lead), 00-9180 (con), 00-9231 (xap), 00-9239 (xap), and 00-9240 (xap)

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUSSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

V.

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL

VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	*****
5/7/01	Case heard before WINTER, STRAUB, POOLER C.JJ. (TAPE: #207) [DT]
	*****
8/7/02	Judgment of the district court is Affirmed in part, Vacated in part and Remanded by published signed opinion filed. (CJS) [00-9159, 00-9180, 00-9231, 00-9239, 00-9240] [DT]
8/7/02	Notice to counsel re: Opinion filed. [DT]
8/7/02	Judgment filed. [Entry Date: 8/7/02] [DT]
8/7/02	Judge RKW DISSENTING in a separate opinion filed. [DT]
	*****
10/3/02	Order filed stating re: An opinion and judgment having been filed on August 7, 2002, IT IS ORDERED that the opinion and judgment

DATE	PROCEEDINGS
	are hereby withdrawn, pending further proceedings before and amendment by the panel. As jurisdiction is retained by the panel, the mandate will not issue until further order. Before: RKW, CJS, RSP, C.JJ. (LC) [DT]
	*****
8/18/04	Judgment of the district court is Affirmed in part, vacated in part, and remanded for further proceedings by published signed opinion filed. (CJS) [EA]
8/18/04	Judge Winter dissents in a separate opinion, filed. [EA]
8/18/04	Judgment filed. [EA]
	*****
2/11/05	Order filed stating: A poll on in banc rehearing was conducted among the active judges of the court, a majority of whom voted to deny rehearing in banc. Judges of the court expect to file opinions in due course. (LC) [EA]
	*****
4/11/05	Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing in banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case in banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc was DENIED by order of the

court filed February 11, 2005. The court hereby AMENDS that order to further reflect that, upon consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was DENIED. Judge Winter dissents from the denial of rehearing.

The court also AMENDS the February 11, 2005, order to reflect the opinions dissenting from the court's denial of rehearing in banc filed by Chief Judge Walker, Judge Jacobs, and Judge Cabranes. Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley dissent from the denial of rehearing in banc. Simultaneously with this order, Chief Judge Walker is filing a dissenting opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join. Other judges of the court have indicated that they expect to file opinions concurring in the denial of in banc rehearing in due course. Further dissenting opinions may also be forthcoming. If further opinions or amended opinions are filed, this order will be amended as necessary to reflect those opinions. [AM]

*****

4/18/05 Judge Sack and Katzmann, C.JJ. with whom Sotomayor and B.D. Parker, C.JJ. join, concurring in the decision to deny rehearing en banc

DATE	PROCEEDINGS
	concurs in a separate opinion, filed.
	*****
5/11/05	Amended published signed opinion filed.
	Hon. Guido Calabresi, Circuit Judge, concurring in the denial of rehearing en banc.
	Hon. Reena Raggi, Circuit Judge, dissenting from the denial of rehearing en banc.

[U.S. Dist. Ct., Dist. of Vermont (Title omitted), Exhibit BBB-4; 2d Cir. Trial Exhibits Volume V:E-1705-12]

Secretary of State

CAMPAIGN FINANCE SUMMARY

GOVERNOR

1978	
Granai (D):	$ 49,920.14
Snelling (R):	$ 62,648.73
1980	
Clifford (R):	$ 223.83
Cullen (I):	$ 1,087.42
Diamond (D):	$ 136,506.73
O'Connor (D):	$ 54,874.41
Potthast(D/LU):	$ 552.73
Snelling (R):	$ 147,382.82
Woodward (I):	$ 6,182.21
1982	
Buttolph (L):	$ 386.00
Gottlieb (LU):	$ 150.00
Kunin (D):	$ 259,350.91
Snelling (R):	$ 190,868.45
1984	
Easton (R):	$ 547,854.62
Gottlieb:	$ 800.00
Kunin (D):	$ 408,379.96
Wick (R):	$ 238,337.95
Wicker (L):	$ 2,605.01
1986	
Gottlieb (LU):	$ 16.25
Kunin (D):	$ 517,995.69
Sanders (I):	$ 57,859.53
Smith (R):	$ 508,960.88

1988		
Kunin (D):	$	698,203.00
Bernhardt (R):	$	457,808.00
1990		
Atkinson (L):	$	6,273.25
Welch (D):	$	281,540.50
Snelling (R):	$	447,478.43
1992		
Dean (D):	$	253,527.17
McClaughry (R):	$	139,691.28
1994		
Allen (I):	$	626.21
Brueckner (I):	$	3,596.33
Dean (D):	$	180,144.85
Gropper (R):	$	11,675.89
Jaccaci (PV):	$	720.00
Kelley (R):	$	33,616.04
Lane (GR):	$	714.06
Morse (I):	$	113,426.53
St. Francis (IA):	$	890.00
1996		
Dean (D):	$	124,975.55
Gropper (R):	$	46,241.41
Herbert (LU):	$	454.00
Lane (GR):	$	556.00
Randall (Lib):	$	9,103.13
St. John (I):	$	6,471.66

LT. GOVERNOR

1980		
Garland (R):	$	27,697.67
Kunin (D):	$	35,994.22
1982		
Bouricius (CP):	$	383.10
Ryan (D):	$	13,582.21
Smith (R):	$	22,543.21
Sternbach (LU):	$	148.39
1984		
Carnahan (D):	$	20,422.91
Smith (R):	$	20,805.83
1986		
Auld (Susan) (R):	$	64,997.08
Dean (D):	$	68,424.00
Smith (R):	$	1,992.34
1988		
Zolatas (R):	$	19,733.00
Dean (D):	$	30,725.00
1990		
McCarren (R):	$	68,073.43
Dean (D):	$	121,551.13
Bernhardt (R):	$	153,054.67
1992		
Snelling (R):	$	106,917.98
Wolk (D):	$	69,786.98

1994

Racine (D):	$	100,453.03
Snelling (R):	$	100,614.60

1996

Carroll (R):	$	171,690.00
Coleman (GR):	$	205.66
Racine (D):	$	95,896.88

STATE
TREASURER

1980

Hebard (R/D):	$	972.90

1982

Craven (LU):	$	256.61
Hebard (R):	$	1,126.56
Llana (D):	$	1,648.43

1984

Hebard (R):	$	752.60
Stone (CP/LU):	$	30.00

1986

Hebard (R):	$	803.85
Stone (LU):	$	10.00

1988

Walker (R):	$	31,846.62
Ruse (D):	$	27,619.29
Ellis (L):	$	506.21
Craven (LU):	$	726.63

1990		
Ruse (D)	$	33,830.64
Crisman (R)	$	28,255.03
1992		
Ruse (D):	$	82,664.00
Smith (R):	$	18,668.32
1994		
Douglas (R):	$	3,796.36
Schumacher (NL):	$	-0-
1996		
Bushey (GR)	$	-0-
Douglas (R/D)	$	1,815.61

SECRETARY OF STATE

1980		
Babcock (D):	$	17,302.95
Douglas (R):	$	19,461.56
McCann (D):	$	4,026.00
Smith (R):	$	49,127.40
1982		
Douglas (R/D):	$	2,622.53
Wicker (L):	$	179.19
1984		
Douglas (R):	$	3,332.07
Sharp (D):	$	861.07
1986		
Dodge (D):	$	6,990.27
Douglas (R):	$	10,085.01

1988		
Douglas (R)	$	1,431.23
1990		
Douglas (R/D)	$	1,568.07
1992		
Hooper (D):	$	73,194.07
Milne (R):	$	38,764.98
Stokes (R):	$	9,601.00
1994		
Hooper (D):	$	38,430.28
Mendicino (R):	$	14,827.03
Milne (R):	$	25,955.32
Padilla (NL):	$	-0-
1996		
Costanzo (Lib):	$	310.70
De Pierro (GR):	$	13.32
Milne (R/D):	$	2,750.66

AUDITOR OF ACCOUNTS

1980		
Acebo (R/D):	$	998.99
1982		
Acebo (R):	$	1,648.96
Randlet (D):	$	50.00
1984		
Acebo (R):	$	1,047.23

1986		
Acebo (R):	$	-0-
1988		
Dana (L)	$	48.00
Rose (D)	$	444.00
Acebo (R)	$	2,606.88
1990		
Acebo (R)	$	6,082.08
Boucher (D)	$	27,723.8
1992		
Flanagan (D):	$	40,573.95
Crisman (R):	$	17,528.17
1994		
Flanagan (D):	$	29,127.63
McLaud (NL):	$	-0-
Redden (GR):	$	25.00
Thorn (R):	$	11,631.66
1996		
Baker (Lib):	$	516.36
Flanagan (D):	$	59,592.78
Morrissey (R):	$	26,885.93

ATTORNEY GENERAL

1980		
Easton (R):	$	66,888.00
Skinner (D):	$	54,040.79

1982		
Easton (R/D):	$	22,786.77
Teal (LU):	$	82.69
1984		
Amestoy (R):	$	60,151.84
Condosta (LU):	$	40.00
Lawlor (D):	$	37,579.35
1986		
Amestoy (R):	$	59,411.49
Condosta (LU):	$	.88
1988		
Flanagan (D):	$	135,901.35
Amestoy (R):	$	48,750.10
1990		
Amestoy (R/D):	$	1,900.95
1992		
Amestoy (R/D):	$	4,406.00
1994		
Amestoy (R):	$	3,571.95
Mulcahy (NL):	$	-0-
Talcott (GR):	$	-0-
1996		
Amestoy (R/D):	$	4,526.25
Kingston (GR):	$	.32

[U.S. Dist. Ct., Dist. of Vermont (Title omitted), Exhibit A; 2d Cir. Trial Exhibits Volume I:E-0095-96]

[NO. 64. AN ACT RELATING TO PUBLIC FINANCING OF ELECTION CAMPAIGNS, DISCLOSURE REQUIREMENTS AND LIMITS ON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES

(H.28)

It is hereby enacted by the General Assembly of the State of Vermont:]

*****

H. 28

*****

Sec. 1 LEGISLATIVE FINDINGS AND INTENT

(a) The General Assembly finds that:

(1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds.

(2) Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions.

(3) In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.

(4) Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.

(5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors.

(6) In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.

(7) In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

(8) Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small group contact between candidates and the electorate and will encourage the personal involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.

(9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.

(10) Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.

(11) Public financing of campaigns, conditioned on an appropriate number of qualifying contributions, will increase citizen participation and will limit the time

spent soliciting contributions, and will reduce the need of elected officials to respond to, and provide access to, contributors. As a result candidates will be freed to devote more time and energy to debate of the issues and elected officials will be able to spend more time responding to constituents and to performing their official duties.

(12) Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.

(13) In Vermont, campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

(14) Identification of persons who publish political advertisements assists in enforcement of the contribution and expenditure limitations established by this act.

(15) Because it is essential for all candidates to have their names and positions on issues known to the electorate and because incumbents have a substantial advantage in these areas, public grants and campaign expenditures must be reduced for incumbents.

(b) This act is necessary in order to implement more fully the provisions of Article 8 of Chapter 1 of the Constitution of the State of Vermont, which declares "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution."

(c) The General Assembly adopts this act to provide

public campaign financing for elections for certain offices, initially the offices of governor and lieutenant governor, to provide restrictions on excessive campaign expenditures, and to provide other regulations of contributions to and expenditures for election to office in the state.

[U.S. Dist. Ct., Dist. of Vermont, Exhibit BB; 2d Cir. Trial Exhibits Volume III:E-1094-1111]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

MARCELLA LANDELL, et al.,

v. Docket No. 2:99-cv-146

WILLIAM H. SORRELL, et al.,
Defendants
and
MIKE FIORELLO, et al.,
Defendant-Intervenors

NEIL RANDALL, et al.,
Plaintiffs

v. Docket No. 2:99-cv-234

WILLIAM H. SORRELL, et al.,
Defendants
and
MIKE FIORELLO, et al.,
Defendant-Intervenors

[Randall]PLAINTIFFS' RESPONSES TO DEFENDANTS' REQUESTS FOR ADMISSIONS

*****

49. Most candidates for the Vermont House of

Representatives do not use television advertising in their campaigns for election.

RESPONSE: Unable to admit or deny, as Plaintiffs do not have knowledge of what "most candidates" do. Plaintiffs admit that many candidates for the Vermont House of Representatives have not used television advertising in past campaigns.

*****

80. Most candidates for the Vermont House do not hire paid campaign managers.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates." Plaintiffs believe the matter is most likely true.

81. Most candidates for the Vermont Senate do not hire paid campaign managers.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates."

82. Most candidates for the Vermont House do not hire any paid campaign staff.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates." Plaintiffs believe the matter is most likely true.

*****

84. Campaigns for election to the Vermont House have been more focused on in-person contact with voters than on television and radio advertising.

RESPONSE: Plaintiffs are unable to admit or deny as they do not understand the meaning of "more focused on". Plaintiffs admit that few Vermont House races have in the past used television advertising.

85. Campaigns for election to the Vermont Senate have been more focused on in person contact with voters than on television an radio television.

RESPONSE: Plaintiffs are unable to admit or deny as they do not understand the meaning of "more focused on". Plaintiffs admit that few Vermont Senate races have in the past used television advertising.

*****

87. Television cable companies offer public access channels in many Vermont communities.

RESPONSE: Admitted.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibit AA; 2d Cir. Trial Exhibits Volume III:E-1068-88]

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
BURLINGTON DIVISION

MARCELLA LANDELL, et al. *Plaintiffs,* *v.* WILLIAM H. SORRELL, et al. *Defendants.* and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al. *Defendant - Intervenors* and NEIL RANDALL, et al. *Plaintiffs,* *v.* WILLIAM H. SORRELL, et al. *Defendants.* and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al. *Defendant-Intervenors*	No. 2:99-cv-146

LANDELL PLAINTIFFS' RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSIONS

The Landell Plaintiffs respond to Defendants' Requests for Admissions as follows:

*****

3. Measured by population, House districts in Vermont are the second smallest in the country.

RESPONSE

Admit

*****

47. The lower spending limit for incumbents in 17 V.S.A. § 2805a helps offset the advantages that incumbents have been thought to enjoy in elections.

RESPONSE

Plaintiffs admit that this specific provision, taken alone, may have this effect. Plaintiffs deny that this effect will necessarily offset countervailing effects from other aspects of the challenged statutes.

48. The spending limits in 17 V.S.A. § 2805a will allow candidates in Vermont to spend less time attempting to raise campaign funds than would be the case if spending were unlimited.

RESPONSE

Plaintiffs admit that this specific provision, taken alone, may have this effect. Plaintiffs deny that this effect will necessarily offset countervailing effects from other aspects of the challenged statutes.

49. Most candidates for the Vermont House of Representatives do not use television advertising in their campaigns for election.

RESPONSE

Admit

*****

51. Although 86% of Vermont House candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 7% of Vermont House candidates did so in 1996, and 9% did so in 1998.

RESPONSE

Admit

52. Although 87% of Vermont Senate candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of Vermont Senate candidates did so in 1996, and 3% did so in 1998.

RESPONSE

Admit

53. Although 90% of candidates for Vermont statewide office filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of candidates for Vermont statewide office did so in 1996, and none did so in 1998.

RESPONSE

Admit

54. Voluntary spending limits have not been adhered to by most candidates for state office in Vermont in the last two election cycles.

RESPONSE

Admit

*****

80. Most candidates for the Vermont House do not hire paid campaign managers.

RESPONSE

Admit

81. Most candidates for the Vermont Senate do not hire paid campaign managers.

RESPONSE

Admit

82. Most candidates for the Vermont House do not hire any paid campaign staff.

RESPONSE

Admit

83. Most candidates for the Vermont Senate do not hire any paid campaign staff.

RESPONSE

Admit

84. Campaigns for election to the Vermont House have been more focused on in-person contact with voters than on television and radio television.

RESPONSE

Plaintiffs object that this request is vague and ambiguous in that it provides no standard for evaluating how a campaign has been "more focused," and also requests a broad categorization of numerous diverse campaigns. Subject to this objection, Plaintiffs admit that some of these campaigns may have been more focused on in-person contact with voters than on television or radio advertising, but deny that all of them have been focused in such a manner.

85. Campaigns for election to the Vermont Senate have been more focused on in-person contact with voters than on television and radio advertising.

RESPONSE

Plaintiffs object that this request is vague and ambiguous in that it provides no standard for evaluating how a campaign has been "more focused," and also requests a broad categorization of numerous diverse campaigns. Subject to this objection, Plaintiffs admit that some of these campaigns may have been more focused on in-person contact with voters than on television or radio advertising, but deny that all of them have been focused in such a manner.

*****

87. Television cable companies offer public access channels in many Vermont communities.

RESPONSE

Admit

*****

89. There are methods of communicating with voters in Vermont that do require any expenditure of money.

RESPONSE

Admit

90. Door-to-door campaigning in Vermont for election to the Vermont House does not require any expenditure of money.

RESPONSE

Plaintiffs admit that some door-to-door campaigning does not necessarily require an expenditure of money, but deny that door-to-door campaigning never requires an expenditure of money.

91. Door-to-door campaigning in Vermont for election to the Vermont Senate does not require any expenditure of money.

RESPONSE

Plaintiffs admit that some door-to-door campaigning does not necessarily require an expenditure of money, but deny that door-to-door campaigning never requires an expenditure of money.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibit BB; 2d Cir. Trial Exhibits Volume III:E-1089-93]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

NEIL RANDALL et al,
Plaintiffs

v. Docket No. 2:99-cv-234

WILLIAM H. SORRELL, et al.
Defendants
and
MIKE FIORELLO, et al.
Defendant-Intervenors

MARCELLA LANDELL, et al.

v.

WILLIAM H. SORRELL, et al. Docket No. 2:99-cv-146
Defendants
and
MIKE FIORELLO, et al.
Defendant-Intervenors

[Randall] PLAINTIFFS' AMENDED AND SUPPLEMENTAL RESPONSES TO DEFENDANTS' REQUESTS FOR ADMISSIONS

NOW COME the Plaintiffs, Neil Randall, et al., through their attorneys, and amend and supplement

their Responses to Defendants' Requests for Admissions, dated January 14, 2000 as follows:

51. Although 86% of the Vermont House candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 7% of Vermont House candidates did so in 1996, and 9% did so in 1998.

RESPONSE: Admitted

52. Although 87% of Vermont Senate candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of Vermont Senate candidates did so in 1996, and 3% did so in 1998.

RESPONSE: Admitted.

53. Although 90% of candidates for Vermont statewide office filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of candidates for Vermont statewide office did so in 1996, and none did so in 1998.

RESPONSE: Admitted.

54. Voluntary spending limits have not been adhered to by most candidates for state office in Vermont in the last two election cycles.

RESPONSE: Admitted.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibits U-1, U-2, U-3; 2d Cir. Trial Exhibits Volume III:E-0938-98]

Expert Report of Anthony Gierzynski

Landell v. Sorrell Docket No. 2:99-cv-146

And

Randall v. Sorrell Docket No. 2:99-cv-234

Date: March 13, 2000

/s/
Anthony Gierzynski, Ph.D **[*2]**

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C. Effect of Contribution Limits on Contributors

D. Burlington Mayoral Race

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F. Effect of Out of State Limits

V. Expenditure Limits: Data Analysis

A. Effect on State-wide Candidates

B. Effect on Legislative Candidates

VI. Conclusion [*3]

I. Personal Background

I am an associate professor of political science (with tenure) at the University of Vermont. I have been a professor at the University of Vermont for over seven academic years. Prior to that I held a research position at the Social Science Research Institute at Northern Illinois University. I earned a doctorate in political science at the University of Kentucky in 1989. I am a nationally recognized scholar on the financing of campaigns, especially state legislative campaigns.

As indicated in my curriculum vitae, my areas of academic expertise are campaign finance, elections, and political parties. Since 1989, I have authored two books and authored or co-authored about a dozen academic articles and book chapters related to the subject of financing elections. The second and most recent book, *Money Rules: Financing Elections in America*, has just been published (in January 2000). Additionally, I have been the co-principle investigator on grants from the National Science Foundation and the Joyce Foundation for the purpose of studying campaign finance at the state and local level. The project funded by the National Science Foundation involved a group of scholars collecting campaign finance revenues from 18 states over 4 election cycles. The Joyce Foundation funded project was a study of the financing of city elections in Chicago, Illinois.

I have been retained as an expert in this matter by counsel for the defendants and defendant-intervenors at a rate of $100 per hour. I previously served as an expert for the state of Vermont on the issue of campaign finance in *Vermont Right to Life Committee, Inc. v. Sorrell* (docket no. 2:97-cv-286) **[*4]**.

II. Introduction

The purpose of this report is to examine the effect of

Vermont's campaign finance law – enacted by the legislature in 1997 under "An Act Relating to Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures" – on campaigns for state offices. More specifically, I will explore the impact the Act's contribution and expenditure limits may have on candidates' and committees' ability to communicate with voters by examining campaign contribution and expenditure patterns in recent Vermont elections.

The 1997 Act provides public funding for candidates running for governor and lieutenant governor. It limits the amount a person, organization, party, or committee may contribute to a candidate, committee, or party. It limits the amount candidates can spend on their campaigns, with lower expenditure limits for incumbent candidates. And, it limits out of state contributions to a total of no more than 25% of a candidate's revenue. In Figure 1 I summarize relevant aspect of the new law.

[Figure I About Here]*

*[Editing Note: This and following bracketed references to Figures/Tables were in the original report, but the Figures/Tables were appended to the report as here.]

Prior to the adoption of the 1997 legislation, individuals, organizations, and committees could give up to $1,000 to a candidate per election. The legislation limits those contributions to $400 to statewide offices, $300 to state senate candidates, and $200 to state house candidates (all limits cover a two-year general election cycle). Prior to the new legislation, there was no limit on out-of-state contributions, no limit on the amount that could be contributed to political party organizations, no limit on the amount that political party organizations could contribute to candidates, and there was a system of voluntary limits on campaign spending. The Act limits

out-of-state contributions to 25% **[*5]** of a candidate's total revenue. It limits the amount an individual or organization can contribute to political parties to $2,000 in a two-year general election cycle. It limits the amount that party organizations may contribute to their candidates to the amount allowed individuals and political committees. The legislation limits expenditures by nonincumbent gubernatorial candidates to $300,000, lieutenant governor candidates to $100,000, and the other statewide offices to $45,000. Incumbents are allowed to spend only 85% of those limits. Candidates for the state senate are allowed to spend $4,000 (plus $2,500 for each additional seat in the district) and state house candidates are allowed to spend $2,000 ($3,000 if the candidate is running in a two-member seat). Incumbent senate and house candidates are allowed to spend 90% of those limits. Before turning to the analysis of the effects the limits in the 1997 law may have on candidates, political committees, and political parties, it is important to discuss the context in which the new law will operate, that is, Vermont's history with regard to regulating campaign finance and the nature of elections in this state.

A review of Vermont's history that the 1997 Act is not a unique occurrence; indeed Vermont has had a history of regulating campaign finance behavior. In 1916 Vermont voters approved (in a referendum) a primary election and corrupt practices act that had been passed by the legislature in the previous year.[1] The law established a fine for purchasing votes and required that primary candidates file campaign finance reports with

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[1]The material on the history of campaign finance law in this paragraph comes from Paul S. Gillies article, "The Disinfecting Light: The Public Disclosure of Campaign Finances,"in *We Vermonters: Perspectives on the Past*, Michael Sherman and Jennie Versteeg, editors (Montpelier, VT: Vermont Historical Society, 1992).

the state. In 1961 the state set campaign spending limits for primary candidates (the Republican dominance of state politics at the time meant that the primary, **[*6]** not the general election, was the determining contest and thus the one that needed regulation).[2] The $7,500 expenditure limits established in that act lasted until the state revised the law in 1972. In 1972 the legislature enacted a law that limited contributions from "a single source, except a contribution from a political party" to $1,000.[3] It limited contributions made to political parties to $1,000. And, it limited gubernatorial candidates' expenditures to $40,000 per election and other candidates to $20,000 per election.[4] The 1972 spending limits were repealed in response to the Supreme Court's *Buckley* decision. In 1982, 1986, and 1988 the legislature made minor changes in the law, mainly concerning disclosure requirements.[5]

Whereas the acts of the legislature and the public show Vermonters have long been concerned over the corrupting influence of money in the state's politics, Vermont has been and still is a state where candidates can be successful without spending large sums of money. Unlike elections in many other states, elections in Vermont are contests where candidates of lesser financial means can still effectively communicate with voters and win. This is due largely to the small size of the state and the low costs of campaigning here. Vermont ranks 49th

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[2]Public Act 178 – "An Act to Limit the Amount That May be Spent by and for a Candidate for Public Office in a Primary Election for State Office."

[3]Public Act 259 – "An Act to Add 17 V.S.A. Chapter 36 Relating to Limitations on Election Expenses in Primary and General Elections."

[4]Public Act 259.

[5]Paul S. Gillies, "The Disinfecting Light: The Public Disclosure of Campaign Finances."

out of the 50 states in population.[6] It is served by a relatively inexpensive media market. Smaller media market stations (media markets are ranked based on the number of TV viewing households) charge less for advertising **[*7]** and the Burlington-Plattsburg media market is ranked 91st nationally; for sake of comparison, Boston is 6th.[7] Because of its small size and culture of intimate, participatory politics, elections are not dominated by media-centered battles as they are in larger states, including our neighbor to the west. "Retail politics" still dominates in Vermont; most candidates' electoral fortunes are heavily dependent on one-on-one contact with voters in door-to-door campaigning. As one former prominent state politician put it,

> A massive war chest isn't necessary, nor does there have to have an entourage of help to get elected. If someone dedicates approximately seven weeks of work, a minimum of brain labor, and a budget that can reach as low as a couple of hundred dollars he or she can, everything else considered get elected. . .
>
> The major component of any successful campaign is basic person-to-person contact. That is necessary no matter what office a person runs for or from what area they are running.[8]

State house candidates campaign in districts with populations of either slightly under 4,000 (for single member districts) or just under 8,000 (for two-member

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[6]U.S. Census Bureau, http://www.census.gov/population/estimates/state/st-99-1.txt.

[7]*Television & Cable Factbook* (Washington, D.C.: Television Digest, Inc., 1999).

[8]Ralph Wright, *All Politics is Personal* (Manchester Center, Vermont: Marshall Jones Company, 1996), p. 233.

districts). Only New Hampshire has legislative districts with smaller populations.[9] The typical number of voters in these districts is smaller – once considering those of voting age and the level of voter turnout. The average number of votes received by winning candidates in single-member house districts in 1998 was 1022 (1585 for winning candidates in two- **[*8]** member districts). With such small districts it is feasible to contact enough voters personally, making money unimportant. This is reflected in the fact 55 of the 150 victorious state house candidates in 1998 (36.7% of all House winners) did not raise or spend above the $500 threshold for filing a campaign finance report. Only about 14% of house winners (in both single-member and two-member districts) spent more than $2,000. Among these low spending winners were a significant number of winning challengers (9 in all), such as George Cross and Kenneth Atkins who both beat out an incumbent for the Chittenden-1-3 district while not spending or raising enough to need to file a campaign finance report.

State senate districts are larger than house districts, with about 19,600 constituents per senator (so 2 member senate districts would have twice that amount; Chittenden County, the largest with 6 seats has a population of approximately 117,800). These senate districts, however, are still at the bottom end of district size in the U.S. Going door to door is still a crucial element of Senate campaigns. Media campaigns, especially television, are not efficient in most senate districts because of the lack of congruence between media markets and district boundaries (because candidates purchasing media time pay to reach many voters that are not in their

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[9]Anthony Gierzynski, "Elections to State Legislatures," in *Encyclopedia of the American Legislative System*, ed. Joel H. Silbey (New York: Scribner's, 1994), pp. 436-437.

districts).

For statewide candidates, campaign expenditures and mass media buys are more important, but not the most important factor in a candidate's success. The relatively small size of Vermont (its population is smaller than the population of one *state* senate district in California) means direct contact with voters is still important, as are voter **[*9]** mobilization programs run by the political parties.[10] Additionally, media organizations within the state – especially Vermont Public Radio, WCAX-TV and WPTZ – provide statewide candidates with many forums that allow the candidates to communicate substantive and unfiltered messages to the Vermont public for free.

This culture of "intimate politics" is reflected in the small amounts of money spent in Vermont campaigns over the past 3 election cycles. In Table 1 I present the expenditure levels for major party candidates for governor and lieutenant governor and the mean and media expenditures for major party candidates for the other statewide offices and state legislative candidates in the 1994, 1996 and 1998 general election. The winning candidate for governor spent under $200,000 in the 1994 and 1996 campaigns, and $435,237 on his 1998 campaign. One political scientist's analysis of the average costs of gubernatorial campaigns in the 50 states, found Vermont to rank 49th (spending analyzed between 1978 and 1993).[11] Spending by candidates for lieutenant governor averaged about $115,000. Two of these races were extremely competitive. The average for the other state-

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[10]A large part of the Democrats' electoral success in 1998 was the voter identification and mobilization program run by the state party.

[11]Thad Beyle, "Governors: The Middlemen and Women in Our Political System," in *Politics in the American States: A Comparative Analysis* (sixth edition) eds. Virginia Gray and Herbert Jacob (Washington: Congressional Quarterly Press, 1996), pp. 216-217.

wide races all were under $30,000 with the exception of the losers in 1998.

In terms of house campaigns, it is important to note that 35.5 percent of state house candidates in 1998 did not file campaign finance reports, meaning they did not receive or expend any amounts in excess of $500 (the threshold over which one is required to file a report). For purposes of this analysis, those non-filing candidates were **[*10]** assigned expenditures of $500, thus conservatively inflating the averages over what is probably actually spent. The average winner and loser in house campaigns spent well under $2,000 in all three elections.

Given the nature of Vermont elections the campaign finance regulatory system established by the 1997 Act appears quite reasonable. (This initial impression is born out by the more rigorous and detailed analysis to follow.) The expenditure limits and contribution limits are proportionate to the amount of financial activity that takes place within the state's elections. Sums lost to the fact that a candidate must take smaller checks can be easily made up for by other contributors (or by couples writing separate checks). This is most obvious with house contests. An average house candidate needs only 6 contributions of the $200 maximum to fund a campaign. But it is also true for other races as well. For the most expensive race, the gubernatorial race, the $400 limit means candidates in the 1998 election would have had to solicit 632 to 1,089 contributions at that level to have raised as much as they spent (632 contributions for Dwyer, 1,089 for Dean). The 1,089 contributions Dean would have had to raise are in comparison to the 1,684 contributions he actually collected for the 1998 election.

Under the previous law, the $1,000 limits left Vermont susceptible to growing interest group influence – a few interests could easily fund most legislative campaigns (2 would do for state house campaigns under the

old law). Such a dependence on so few sources for campaign funding leads to questions about the independence of representatives from those donors' interests. **[*11]**

III. Methodology

The analysis that follows is based on campaign finance reports filed with the Vermont Secretary of State's Office for the 1994, 1996, and 1998 elections. I constructed data files with the assistance of students at the University of Vermont.[12] The files included relevant candidate electoral information – votes, incumbency, district, etc. – total contributions (as best ascertained from the candidates' and committees' last report or from totaling itemized and non-itemized contributions), total expenditures (as best ascertained from the candidates' and committees' last report or from totaling itemized expenditures), itemized contributions, and itemized expenditures. Data cover the two-year election cycle for each election. Much of the analysis focuses on major party candidates since third party candidates or independents failed to raise or spend much during the 1994 to 1998 elections.

It should be noted that the analysis that follows is based on a worst-case scenario. By projecting previous patterns of campaign finance behavior onto future elections, the analysis assumes that there will be no adjustments in fundraising techniques or in patterns of giving under the new law. This results in estimates of the effect of the new law that may overstate the law's burden on candidates and contributors since it is quite evident

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[12]The National Institute on Money in State Politics computerized the 1998 contributions to candidates under the supervision of Samantha Sanchez. I read these data using SPSS/PC, checked and cleaned the data for my purposes (the data was accurate and complete), and aggregated the multiple contributions made to one candidate.

from the history of campaign finance regulation that candidates and campaign committees adapt quickly to changes in campaign finance law. Other, more specific assumptions that are made during the analysis follow the same principle. For example, **[*12]** candidates who did not file campaign finance reports are assumed to have raised and spent $500 on their campaign, which is the maximum they could raise or spend without being legally required to file a report of the campaign finance activity.

IV. Contribution and Out of State Limits: Data Analysis

The questions that arise from the limits on contributions enacted in the 1997 law are 1) whether the limits hinder candidates' ability to raise funds and thus their ability to communicate with voters, and 2) whether those limits have a significant impact on most donors' contributions. This section examines the contribution patterns in the 1994, 1996, and 1998 elections in order to answer these questions. Based on previous patterns, the analysis does find that the 1997 Act will have a minimal effect on both candidates' ability to raise funds and on individuals' and committees' ability to give to campaigns.

To analyze the effect of the law on contributions, I aggregated multiple contributions from each source to candidates, parties, or committees. Contributions from couples were **not** divided in two, even though under the 1997 Act a couple that made an $800 contribution to a candidate for statewide office in the past could contribute $400 each in 2000 and thus see no reduction in their ability to give. This decision thus overestimates the assessment of the impact of the contribution limits. Contributions from the candidate themselves were not included in the analysis as the contribution limits do not apply to such contributions. No attempt was made, however, at identifying immediate family members that

may have contributed; this, again, will overestimate the impact of the limits. Since political party contributions were previously unlimited, the analysis will, in places, treat party contributions separately. **[*13]**

To assess the impact the Act's contribution limits may have on candidate financing, one can compare past contributions with the new limits. Overall, only a small proportion of contributions made during the last three elections would have been affected by the new limits that are established under the 1997 Act. Table 2 lists the number and percent of contributions in the past three elections that were in excess of the new limits for statewide candidates, senate candidates, house candidates, party committees, and political committees. The percentage of all contributions received by statewide candidates in the past three elections that were greater than the new limits never got as high as 10%. The percentage of all contributions received by senate and house candidates were well below 10% in 1994 and 1996. In 1998 the percentage increased to 17.2% for senate candidates and 11.9% for house candidates, mainly due to a large increase in party funding activity that year. Party organizations and political committees receive an extremely small percentage of their contributions in excess of the new limits – 2.4% for parties and 0.6% for political committees in 1998.

If we exclude party contributions from the analysis – since political parties operated under no contribution limits in these elections – the percentage of contributions greater than the limit is smaller, especially in the case of senate and house candidates in the most recent election. The percentage of nonparty contributions over the limits for senate candidates in 1998 was 14.2% and for house candidates 6.5%.

Thus, looking at the overall pattern of contributions it is clear that the contribution limits set by the legisla-

ture in 1997 would affect only a small percentage of contributors.

[Table 2 About Here] **[*14]**

A. Effect of Contribution Limits on Statewide Candidates' Finances

In Tables 3 through 5 I show the effect of the contribution limits on the finances of statewide candidates. The tables list the number of contributions from individuals and committees that exceed the new limits, the percent of those contributions that exceeded the limits,[13] the amount in excess of the limits (calculated by subtracting the limit from the large contributions and summing the results), and the percent of a candidate's revenue represented by the amount in excess of the contribution limits.[14]

[Table 3 About Here]

Of all of the contributions received or solicited by candidates from individuals and political committees, only a small proportion would have exceeded the limits. In the most expensive campaign of 1998 – the gubernatorial race – 7.8% of Howard Dean's and 13.4% of Ruth Dwyer's contributions exceeded the limits. Only 2 of the

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[13]To calculate the percent of contributions over the limits, I divided the number of contributions over the limit by the total number of itemized contributions plus an estimate of the unitemized contributions. I estimated the number of unitemized contributions by subtracting the total of itemized contributions from the candidates' total revenues and then dividing that total by 100 (the level at which contributions must be itemized). This method of estimating unitemized contributions is a conservative one since it is highly unlikely that all contributions that were not itemized were as large as $100, thus the method undoubtedly underestimates the number of unitemized contributions.

[14]For these calculations, candidate's revenue included amount raised during the election cycle and excluded the amount a candidate carried over from a previous campaign.

11 major candidates for statewide office in 1998 received more than 10% of their contributions in amounts over the 1997 limits – Dwyer and Snelling. None of the third party or independent candidates received any contributions larger than the contribution limits. A similar pattern is found in the 1996 election with only one candidate getting greater than 15% of his contributions in large contributions – John Carroll whose large contributions constituted 15.6% of all his contributions. Only one of the minor candidates received any **[*15]** money in an amount over the limit – St. John had one contribution that was $100 over the limit. In 1994 the percentages of contributions exceeding the limit appears high for a few candidates – 25.4% for Kelly, 40.5% for Hooper, and 43.3% for Flanagan – due mainly to the fact that these candidates apparently did not solicit many contributions; this point is evident by looking at the absolute number of large contributions – 15 for Kelly, 28 for Hooper, and 13 for Flanagan. Again, no third party candidate or independent received any contributions over the contribution limit in 1994.

Thus the number and percentage of contributions received by statewide candidates that would have been affected by the 1997 law are small. Tables 3 through 5 also show the amount of funds raised over the limits and what percentage of a candidate's revenue those funds represent. Here we see much more variation among candidates. For Governor Dean, for example, the amount of money raised over the limits have constituted from 47.6 to 33.1% of his revenues in the past three elections. This is due in large part to the large sums of money the governor has raised out of state from his colleagues in medicine and from other interests around the country; a result that may be tied to his interest in national office. (A national network of contributors is also partly responsible for Ed Flanagan's reliance on large contributions).

Many of the candidates for other offices – including many of those who won – received a smaller portion of their funds in amounts in excess of the 1997 limits. Only 14.3% of Deb Markowitz's funds in her successful campaign against incumbent Secretary of State James Milne came in amounts over the limits. A little over 20% of the funds raised by Doug Racine in his close contest with the well-known Barbara Snelling were from amounts above the limits. (It is **[*16]** important to note again that family contributions were not excluded from these data, consequently the numbers are a bit inflated.)

In reviewing these numbers, one must keep in mind that the incentives under the old law were such as to encourage large contributions. Since it simply made sense to raise the largest contributions possible under the old law, the best way to judge the impact of the new limits is to ask the question, Can a candidate successfully win office while raising revenue in exclusively small contributions? The case of Deb Markowitz clearly demonstrated that it is possible to run an effective campaign raising money in mostly small amounts. Only 3.1% of her contributions exceeded the new $400 limit. $7,500 of her revenue, or 14.3% of her total revenue, was from amounts over the limit (it would take a mere 19 contributions at the $400 limit to replace that amount). And, without any previous electoral experience she unseated an incumbent candidate in a close race. Clearly, she was able to communicate her message to Vermont voter while following campaign finance practices not far from what the 1997 Act specifies. Because she defeated an incumbent in a race for an office that does not garner much attention from the media or the voters, her case represents the best example of how a candidate can win while raising money in small amounts. It should also be noted that Barbara Snelling won the close open-seat race for lieutenant governor in 1994 with less than 15% of her funds coming

from money in excess of the contribution limit.

B. Effect of Contribution Limits on State Legislative Candidates' Finances

Tables 6 through 9 present a number of ways of assessing the possible impact of the 1997 contribution limits on state house and senate candidates. No matter how one **[*17]** looks at these data, it is clear that the $300 contribution limit for senate candidates and the $200 contribution for house candidates will not have any noticeable effect on the ability of legislative candidates to raise funds for their elections and communicate with voters.

The effect of the limits on senate and house candidates' revenues would be minimal. Tables 6 and 7 show the candidate total expenditures and revenues, the sum of the amounts raised over the limit, the percentage of revenues candidates would lose due to the limits, and the average amount of revenues lost to the limits, and the average amount lost per contribution in excess of the limits. The percentage of revenue affected by the limits for senate candidates would have been 10.1% in 1994, 10.8% in 1996, and 18.2% in 1998. The average amounts lost were $577 for 1994, $677 for 1996, and $1,650 for 1998. The percentage of revenue affected by the limits for house candidates was 3.2% in 1994, 5.2% in 1996, and 6.5% in 1998. The average amount affected: $32 in 1994, $42 in 1996, and $115 in 1998. These numbers suggest that the 1997 Act's limits would affect a small and replaceable part of senate and house candidates' revenues.

[Tables 6 and 7 About Here]

There appears to be no systematic difference between incumbents and nonincumbents with regard to the impact of the new contribution limits. In senate contests, challengers relied on more contributions over the limit

than incumbents in 1998 (20.7% of nonincumbents' revenues would have been affected by the limits, 15.5% of incumbents), but in 1996 and 1994 the differences were minimal (a difference of 0.1% in 1996 and 0.4% in 1994). In house races incumbents relied more on large contributions in 1998 and 1996 (with 8% of their revenues over the limit compared to 5.5% of **[*18]** nonincumbents in 1998, and 6.3% compared to 2.9% in 1996) while nonincumbents relied more on large contributions in 1994 (1.5% for incumbents compared to 4.8% for nonincumbents).

Given the pattern of the past three elections, the contribution limits appear to be likely to affect more of the revenues of Democrats and Progressives than Republicans. In two of the three election cycles for senate races and all three of the election cycles for the house, Democrats relied on more money that exceeded the new limits than Republicans. In 1998, for example, 25.5% of Democratic senate candidates' revenues were in amounts in excess of the limit whereas 12.3% of Republican senate candidates' revenues were. In house contests in 1998 8.3% of Democratic candidates' revenues, 5.5% of Republican candidates' revenues, and 10.5% of Progressive candidates' revenues came from amounts in excess of the contribution limits.

Tables 8 and 9 show the number and percent of candidates with the number of the contributions that would have been affected under the new limits in the past three election cycles. Thirty senate candidates (or 39.5% of senate candidates) in the 1998 election cycle had no contributions that exceeded the new $300. Over ½ of senate candidates (52.6%) had 2 or fewer contributions that would have exceeded the new contribution limits. For house candidates, 203 (or 73.6%) of the house candidates in 1998 had no contributions that exceeded the new $200 limit. 85.9% of house candidates received at most 1

contribution over the $200 amount. These patterns show that it is unlikely that many candidates will have a significant number of contributions that will be affected by the new contribution limits.

[Tables 8 and 9 About Here] **[*19]**

However one looks at the patterns of fundraising for house and senate candidates in the past three election cycles, it is evident that the impact of the 1997 Act on these candidates' ability to raise sufficient funds for their campaigns will be minimal. The data from the previous elections show that the money that would be lost under the contribution limits of the 1997 Act constitutes a small enough portion of house and senate candidates' funds that replacing the revenue from these large contributions should not pose a difficulty for candidates.

C. Effect of Contribution Limits on Contributors

In Tables 10 and 11 I examine the impact of the contribution limits on a number of different classifications of contributors to statewide and legislative campaigns over the past three election cycles. Because no information is available regarding unitemized contributions, the analysis in the table is of itemized contributions only; consequently, the numbers will be higher than what they would be if it were possible to include all contributors. "Individual" contributors are all contributors identified by a personal name, regardless of affiliation. "Business" contributors are individual businesses. "Political committee" contributors include all political action committees, associations, and labor unions. "Party organization" contributors are contributions from national, state, and local party organizations.

[Tables 10 and 11 About Here]

The results that stand out most from both tables are

the small number and percentage of contributions from individual citizens that exceed the limit. Among contributions to statewide candidates, only 7.9%, 14.8%, and 12.5% of individual contributions in 1998, 1996, and 1994 exceeded the $400 limit. The average amount **[*20]** over the limit during those elections was $43, $87, and $62. The relatively higher percentage of revenues over the limit in combination with the numbers just mentioned is indicative of a few individual contributors giving large amounts. The number of contributions in excess of the limits that went to legislative candidates is smaller in each year than the number going to statewide candidates, though these contributions constitute a slightly higher percentage of all contributions made – 18.9%, 23.8%, and 18.3% in 1998, 1996, and 1994, respectively. Clearly, the patterns in the previous election cycles show that new limits will not impose a burden on the ability of most citizens to contribute to campaigns.

D. Burlington Mayoral Race

While the analysis of the effect of the limits on statewide and legislative candidates depends on applying the contribution limits to past elections under the old $1,000 limits, at least one major race has occurred since the contribution limits took effect, i.e. the Burlington mayoral race. Under the 1997 Act, candidates for local offices are faced with the same contribution limits as candidates for the state house. A comparison of the amounts raised by mayoral candidates in the largest city in the state between 1997 (before the new limits took place) and 1999 (when the $200 limit on contributions applied) suggests that the limits will not be detrimental to candidates' ability to raise sufficient money to communicate with voters. In 1997 the total amount raised by candidates for mayor was $10,823, in 1999 the total

raised was five times that amount, or $58,025.[15]

E. Missouri Limits versus Vermont Limits [*21]

In *Missouri v. Shrink Missouri Government PAC* (2000) the U.S. Supreme Court recently upheld contribution limits in Missouri that ranged from $1,075 per election for statewide candidates to $275 per election for state house candidates. In Table 12 I compare the recently upheld Missouri limits with the Vermont limits by looking at the two states' contribution limits in light of the size of the constituency (since Missouri's limits are per election, I've doubled the size of the contribution limit to make them comparable to Vermont's election-cycle limits). The size of the constituency gives us an indication of the amount of voters that a candidate would have to reach during his or her election campaign. The ratio of contribution to constituency size gives us an idea of the size of possible contribution vis-a-vis the size of the campaign necessary to reach enough voters. It is clear from looking at the ratio of the limit to the size of the constituency that Vermont's limits are more generous than Missouri's. For statewide races, the ratio of the contribution limit to the size of the constituency for Missouri is .00040 compared to the .00068 ratio for Vermont. For state house districts, the ratios are .01673 for Missouri, .02564 for 2 member districts in Vermont. The ratios for the senate show that the contribution limits are more generous for senate candidates in single member districts, roughly equal for senate candidates in 3 member districts, and slightly less generous when compared to the Chittenden County 6-member senate district. Thus, relative to the size of the constituency – and thus size of the campaign that is necessary – Ver-

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[15]Totals taken from candidate's report filed with the Burlington City Clerk.

mont contribution limits (with the exception of the limit on Chittenden County senate candidates) are as generous or more generous than the Missouri limits recently upheld by the U.S. Supreme Court.

[Table 12 About Here] **[*22]**

F. Effect of Out of State Limit

The 1997 Act placed an aggregate cap on out-of-state contributions – contributions from outside of Vermont cannot exceed 25% of candidates' total revenues. In Tables 13 through 15 I present the proportion of statewide candidates' revenues coming from out of state.

[Tables 13 through 15 About Here]

The statewide candidates provide a wide variety of funding mixes, ranging from no money from out of state to 68.6% of revenues originating from beyond Vermont's borders. Two candidates – Howard Dean and Edward Flanagan – were consistently at the high end of the scale. Governor Dean raised 60.8, 52, and 42.3 percent of his money out of state in 1994, 1996, and 1998, respectively. Edward Flanagan's out of state percentages were 68.6, 44.7, and 66.3. Dean and Flanagan have extensive networks outside of the state that account for these numbers and appear to be unique in this regard. Most of the other statewide candidates' out-of-state revenues do not add up to the 25% limit and all but one of the minor party candidates from 1994 to 1998 received no money from out of state (one candidate received $28 from Nebraska). Additionally, plenty of victorious candidates have won while relying on only a small amount of out-of-state money. Only 19.5% of Ruth Dwyer's funds in 1998 came from out of state, 8.1% of Doug Racine's, and 16.8% of Dwinnell's. At 27.9%, Deb Markowitz's 1998 campaign raised just over the 25% mark out of state. As with the contribution limits, the question is whether there are successful candidates whose pattern of financing fits the

limits of the new law. It is evident from the past experience of statewide candidates as outlined in the three tables that many successful candidates did not need to raise much of their money **[*23]** from outside of Vermont. For example, in three election cycles of competitive races, no candidate for lieutenant governor would have exceeded the out of state limit: the average percentage raised from out of state in these three competitive races was 9.05%.

The impact of the 25% out-of-state limit on house and senate candidates will be minimal if they continue the fund raising practices of the past. This is evident in the average out-of-state contributions and the average percentage of revenues coming from out of state for house and senate candidate from 1994 to 1998. The average percentage of revenues from out of state for senate candidates in 1994 was 7.5%; it was 9% in 1996. It dropped to .9% in 1998.[16] The average percentage for house candidates was 1.7% in 1994, 2.6% in 1996, and 2.2% in 1998. In 1994 93.7% of senate candidates and 96% of house candidates raised less than 25% of their revenues from outside of Vermont. In 1996 it was 87.9% of senate candidates and 97.9% of house candidates. It is quite apparent that the out-of-state limit does not pose a burden on state legislative candidates.

[Table 16 About Here]

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[16]The 1998 "average % out of state" was calculated differently from the average for 1994 and 1996 due to data limitations. The 1998 average % is actually the % of total revenue raised from out of state sources for all candidates (not the average of the percentage for each candidate). Both methods result in similar numbers for 1994 and 1996. The 0.9% for 1998 senate candidates does represent a real drop in identifiable out of state contributions.

V. Expenditure Limits: Data Analysis

In the 1997 campaign finance Act the legislature set expenditure limits for statewide and legislative campaigns. To reflect the well-documented electoral advantage that incumbents accrue from their office, the amount incumbents are allowed to spend under the Act was set at 85% of the spending limit (90% for state house and senate incumbents). So, gubernatorial candidates can spend up to $300,000 during the election **[*24]** cycle, but incumbent governors can only spend $255,000. The limits for each office and the spending by statewide candidates are listed in Tables 17 through 19.[17]

For the three election cycles covered, 17 out of the 29 major party candidates for statewide office spent less than what the spending limits in the 1997 Act would allow. All of the third party candidates failed to spend anywhere near the level of the spending limits. Neither of the major party gubernatorial candidates spent in excess of the limits in 1994 and 1996. In the 1998 contest, Governor Dean exceeded the limit by $180,273 while his Republican opponent could have spent an additional $47,488 before reaching the expenditure limit. The major party candidates in the lieutenant governor races in all three election cycles, however, did exceed the limit.

[Tables 17 to 19 About Here]

The question, once again, is not how many candidates spent more or less than the limit, it is whether a candidate can mount a successful campaign by keeping their spending below the limits imposed by the new law. There are a number of cases that demonstrate that it is possible. Jim Milne unseated incumbent Secretary of State Don Hooper in 1994 while spending $26,733, an amount

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[17]Spending include in-kind contributions given to the candidate but excludes contributions candidates made to other candidates or committees and repayment of loans to the candidate themselves.

that was $18,276 below the new expenditure limits (and about $13,000 less than Hooper spent, see Table 19). Milne was later unseated by Deb Markowitz, who exceeded the limit only because of in-kind contributions (the actual spending of her campaign organization was less than the limit). Ruth Dwyer mounted a serious challenge to incumbent governor Dean in 1998 while **[*25]** spending almost $50,000 less than the new limits will allow. It appears that successful campaigns – of both incumbents and nonincumbents, Democrats and Republicans – are possible when the candidates' spending conforms to the expenditure limits enacted in the 1997 law.

With regard to legislative candidates, most candidates have typically spent less than the new limits. In tables 20 and 21 I present the total and average spending for senate and house candidates with separate data for candidates in different categories. The limits for the house and senate are sensitive to the size of the district in order to allow for the greater number of voters that must be reached. The legislature set the limit for house candidates in single member districts at $2,000 and for two-member districts at $3,000. The limits on senate candidates were set at $4,000 plus an extra $2,500 for every additional seat in the district. And, like statewide races, incumbents are allowed to spend less than those limits (90% of the limit in legislative races) in order to compensate for the advantages incumbents accrue from their position. Because the limitations on senate races are much more sensitive to the size of the district than the limits on house races, I compare average spending to the limits only by the number of seats in the district for senate. For house candidates, I select a number of lower limits to compare with the averages.

[Tables 20 and 21 About Here]

The spending patterns of senate candidates from 1994 to 1998 show that the spending limits will not be a significant constraint on senate campaigns. The average spending by major party candidates in all but the single member districts is below the spending limits for those districts. Senate candidates in 3 member senate districts in **[*26]** 1998, for example, spent on average $8,122, that is $878 below the spending limits set by the legislature in the 1997 Act. For the single member senate districts, the average candidate expenditure in 1994 was $229 over the limit. the amounts were higher in 1996 and 1998, but given the 1994 spending, one could believe successful campaigns in single member districts could be waged while adhering to the spending limits.

The average spending by different types of candidates is included in table 20 to determine whether the limits are more or less likely to affect a certain class of candidate. Incumbents spent more money in each of the three election cycles (reflecting the incumbency advantage in fundraising), though the difference is minimal in 1996. The average Republican senatorial candidate spent slightly more than the average Democrat in 1998, less in 1996, and significantly more in 1994. This lack of a clear pattern suggests the law will not benefit one party's candidates over another in senate races.

House candidates are even less likely to feel constrained by the expenditure limits given their pattern of spending in the previous three elections. In 1998, all categories of candidates for the house spent less than the spending limit. Incumbents spent, on average, $623 less than the strictest limit that could apply to them. Nonincumbents spent $493 less. Candidates in single member districts spent $474 less than the limit for their type of district, candidates in 2 seat districts spent on average $1,799 less than the spending limit. In 1996 only Progressive party candidates spent, on average, more

than the expenditure limit. In 1994 the average Republican and Progressive candidate spent more than the limit, and the average candidate in single member districts spent $10 more than the limit. **[*27]**

As with the senate candidates, the average for the different categories of house candidates suggests that no one group of candidates will suffer more under the new law – there are no consistent patterns of one group of candidates spending more than any other.

In sum, the pattern of spending in the past three elections clearly shows that the expenditure limits in the new law will have a minor effect on state house and senate candidates since most candidates typically have not spent more than what the new law will allow.

VI. Conclusion

The analysis of campaign finance activity in the 1994, 1996, and 1998 suggests that the new regulations established in 1997 under the title "An Act Relating to Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures" are workable for candidates and committees in state elections. The contribution limits are proportionate to the levels of spending that have been typical in the state: the limits do not make it difficult to raise the requisite cash for any of the state's campaigns. While some candidates have relied on larger contributions – which only make sense when such contributions are allowed – there have been many cases where candidates who relied mostly on small contributors have succeeded in winning office; their ability to communicate effectively with voters was not apparently hampered. Also, the patterns of giving over the past three elections suggest that the contribution limits will not affect the ability of most individual citizens to contribute to campaigns. The limit on out-of-state contributions will curtail candidates

who have come to rely on national networks of supporters, but it is evident that one can run a successful campaign fueled by mostly Vermont money. And, finally, while the [*28] expenditure limits would curtail some of the spending seen in recent years, most candidates, especially in house and senate races, have mounted successful campaigns spending well beneath the limits set by the law.

Figure 1: Summary of Vermont's Post 1997 Campaign Finance Law

Contribution Limits		
	Individuals and political committees	Political Party Committees
Governor	$400	$400
Lt gov	$400	$400
Secretary of State	$400	$400
State Treasurer	$400	$400
Auditor of Accounts	$400	$400
Attorney General	$400	$400
State Senate	$300	$300
State House	$200	$200
Political Party Committees	$2,000	$2,000
Political Committees	$2,000	$2,000
No more than 25% of candidate's money can come from out of state, including national political parties		

Expenditure Limits (2 year election cycle)		
	Challengers and open seat	Incumbents (85% of limit for other candidates)
Governor	$300,000	$255,000
Lt gov	$100,000	$85,000
Secretary of State	$45,000	$38,250
State Treasurer	$45,000	$38,250
Auditor of Accounts	$45,000	$38,250
Attorney General	$45,000	$38,250
State Senate	$4,000 + $2,500 for each seat	$3,600 + $2,250 for each seat (90% of challenger spending)
State House	$2,000 ($3,000 if 2-member dist)	$1,800 ($2,700 if 2-member dist) (90% of challenger spending)

Public Funding			
	Qualifying	Grant amount	
		Primary	General
Governor	At least $35,000 from at least 1,500 people in contributions of $50 or less	$75,000	$225,000
Lieutenant Governor	$17,500/750 people/$50 or less	$25,000	$75,000
Incumbents receive 85% of the grant total			

Table 1

Average Campaign Expenditures for Major Party Candidates

	1994		1996		1998	
	winner(s)	loser(s)	winner(s)	loser(s)	winner(s)	loser(s)
Governor	$183,300	$36,268	$191,203	$46,244	$435,273	$252,512
Lt. Governor	$115,719	$106,735	$138,418	$171,690	$114,538	$117,486
Other State-wide	$14,592	$25,719	$18,175	$26,886	$25,052	$39,773
Senate Races	$7,713	$4,121	$7,873	$6,278	$11,999	$5,556
House Races	$1,008	$1,594	$1,094	$1,068	$1,648	$1,453

Note: Figures are for major party candidates in the general election. For the purposes of this table, candidates who did not file a report were assigned an expenditure value of $500 (candidates are required to file a report if expenditures or revenues reach $500).

Effect of Contribution Limits on Individual and Committee Contributions to 1998 Statewide Candidates

	vote %	# of nonparty Contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue raised*
Governor						
Dean (D)	55.7%	145	7.8%	$113,259	33.1%	$342,403
Dwyer (R)	41.1%	126	13.4%	$64,613	25.6%	$252,511
Rome (R)	—	57	4.3%	$27,875	12.9%	$216,289
Berkey (Lib)	0.9%	0	0%	$0	0%	$145
Gottlieb (Lib Union)	0.5%	0	0%	$0	0%	$0
Williams (VG)	1.5%	0	0%	$0	0%	$0
Lt. Governor						
Racine (D)	48.6%	28	8.8%	$24,921	21.5%	$115,838
Snelling (R)	48.1%	87	11.7%	$29,525	25.3%	$116,879
Faeterri (Lib)	0.6%	0	0%	$0	0%	$0
Newton (Lib Union)	0.7%	0	0%	$0	0%	$0
Coleman (VG)	1.8%	0	0%	$0	0%	$0
Secretary of State						
Markowitz (D)	47.8%	23	3.1%	$7,500	14.3%	$52,300
Milne (R)	45.2%	4	3.7%	$3,144	17.8%	$17,623
Richmond (Lib)	2.9%	0	0%	$0	0%	$100
Lane (VG)	3.9%	0	0%	$0	0%	$195
Treasurer						
Douglas (R/D)	85.4%	0	0.0%	$0	0	$9,948
Baker (Lib)	3.6%	0	0%	$0	0%	$0
Linskey (Lib Union)	4.7%	0	0%	$0	0%	$0
Bushey (VG)	6.0%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	52.2%	30	7.8%	$20,855	35.4%	$58,831
Dwinnell (R)	38.9%	15	9.6%	$8,408	22.4%	$37,505
Baker (Lib)	2.8%	0	0%	$0	0%	$142
Jackowski (Lib Union)	2.9%	0	0%	$0	0%	$0
Saetta (VG)	3.0%	0	0%	$0	0%	$0
Attorney General						
Sorrell (D)	83.8%	1	0.0%	$373	1.7%	$21,484
Costanzo (Lib)	4.5%	0	0%	$0	0%	$1,231
Fisher (Lib Union)	2.5%	0	0%	$0	0%	$0
Ward (VG)	8.8%	0	0%	$0	0%	$0

* "Total revenues raised" is the total revenue raised during the election cycle, it does not include balances carried forward from previous campaigns.

Note: Tables 3 through 5 include all nonparty contributions other than contribution a candidate makes to their own campaigns. Party contributions are not included in this analysis because party contributions were not limited at all in these elections and consequently the inclusion of party contributions would greatly skew the results for a few candidates. Dean and Dwyer, for example, would have had 50% and 41% of their revenues, respectively, over the limit if party contributions were included. On the other hand, the secretary of state candidates, Markowitz and Milne, would have had 16.8% and 19% of their revenues from amounts over the limit (minor changes from the numbers in the table).

Table 4

Effect of Contribution Limits on Individual and Committee Contributions to 1996 Statewide Candidates

	vote %	# of nonparty contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue Raised
Governor						
Dean (D)	70.5%	192	10.6%	$188,192	47.6%	$395,424
Gropper (R)	22.4%	17	12.2%	$6,500	14.2%	$45,698
Randall (Lib)	1.1%	2	14.2%	$150	1.5%	$10,284
Herbert (Lib Union)	1.6%	0	0%	$0	0%	$93
Lane (VG)	1.4%	0	0%	$0	0%	$480
St. John (I)	1.2%	1	25%	$100	12.9%	$775
Brunelle (Nat Law)	1.3%	0	0%	$0	0%	$0
Lt. Governor						
Racine (D)	54.0%	28	3.7%	$19,147	17.7%	$108,274
Carroll (R)	41.0%	108	15.6%	$49,050	27.9%	$176,052
Ngoima (Lib Union)	1.0%	0	0%	$0	0%	$0
Coleman (VG)	2.1%	0	0%	$0	0%	$206
Bate (Nat Law)	1.6%	0	0%	$0	0%	$0
Secretary of State						
Milne (R/D)	81.4%	1	0.1%	$800	26.4%	$3,035
Costanzo (L)	3.1%	0	0%	$0	0%	$310
Levy (Lib Union)	3.3%	0	0%	$0	0%	$0
De Pierro (VG)	7.4%	0	0%	$0	0%	$13
Wilder (Nat Law)	4.5%	0	0%	$0	0%	$0
Treasurer						
Douglas (R/D)	85.8%	0	0.0%	$0	0.0%	$8,583
Gottlieb (Lib Union)	3.5%	0	0%	$0	0%	$0
Bushey (VG)	7.0%	0	0%	$0	0%	$0
Bate (Nat Law)	3.4%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	49.6%	39	12.6%	$19,255	24.3%	$79,352
Morrissey (R)	39.1%	13	9.2%	$100	0.3%	$30,025
Baker (L)	2.3%	0	0%	$0	0%	$0
Davenport (Lib Union)	2.5%	0	0%	$0	0%	$0
Sweet (VG)	4.6%	0	0%	$0	0%	$0
McLaud (Nat Law)	1.5%	0	0%	$0	0%	$0
Attorney General						
Amestoy (R/D)	87.2%	4	9.3%	$3,400	37.3%	$9,110
Diamondstone (Lib U)	3.5%	0	0%	$0	0%	$0
Kingston (VG)	6.0%	0	0%	$0	0%	$0
Huston (Nat Law)	3.0%	0	0%	$0	0%	$0

Table 5

Effect of Contribution Limits on Individual and Committee Contributions to 1994 Statewide Candidates

	vote %	# of nonparty contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue Raised
Governor						
Dean (D)	68.6%	218	12.0%	$174,501	47.4%	$368,117
Kelly (R)	19.0%	15	25.4%	$6,850	17.8%	$38,426
Gottlieb (Lib Union)	0.8%	0	0%	$0	0%	$0
Lane (VG)	1.0%	0	0%	$0	0%	$200
Brunelle (Nat Law)	0.7%	0	0%	$0	0%	$0
Jaccaci (People VT)	0.9%	0	0%	$0	0%	$0
Brueckner (I)	0.9%	0	0%	$0	0%	$0
Morse (I)	7.0%	0	0%	$0	0%	$1,339
Lt. Governor						
Snelling (R)	50.2%	72	7.9%	$21,950	14.7%	$149,813
Racine (D)	46.8%	21	4.0%	$14,835	16.8%	$88,185
Haas (Lib Union)	1.3%	0	0%	$0	0%	$0
Bate (Nat Law)	1.4%	0	0%	$0	0%	$0
Secretary of State						
Milne (R)	50.0%	2	1.6%	$581	3.1%	$18,946
Hooper (D)	42.1%	28	40.6%	$9,550	32.0%	$29,875
Herbert (Lib Union)	4.6%	0	0%	$0	0%	$0
Padilla (Nat Law)	3.0%	0	0%	$0	0%	$0
Treasurer						
Douglas (R/D)	91.4%	1	1.3%	$100	1.2%	$8,436
Ngoima (Lib Union)	3.6%	0	0%	$0	0%	$0
Schumacher (Nat Law)	4.8%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	52.0%	13	43.3%	$5,775	39.1%	$14,770
Thorn (R)	38.5%	1	3.4%	$700	5.8%	$11,968
Davenport (Lib Union)	3.9%	0	0%	$0	0%	$0
McLaud (Nat Law)	1.7%	0	0%	$0	0%	$0
Redden (VG)	3.6%	0	0%	$0	0%	$0
Attorney General						
Amestoy (R/D)	87.1%	2	7.1%	$700	15.4%	$4,550
Diamondstone (Lib U)	5.5%	0	0%	$0	0%	$0
Mulchay (Nat Law)	3.7%	0	0%	$0	0%	$0
Talcott (VG)	3.4%	0	0%	$0	0%	$0

Table 2

Contributions Over Limit Received

	1994		1996		1998	
	all	nonparty	all	nonparty	all	nonparty
statewide candidates						
no. contributions over limit	378	371	420	413	519	505
% of contributions over limit	9.5%	9.3%	9.9%	9.8%	7.8%	7.6%
senate candidates						
no. contributions over limit	163	129	160	134	327	258
% of contributions over limit	6.0%	4.8%	4.7%	4.0%	17.2%	14.2%
house candidates						
no. contributions over limit	90	53	115	78	269	136
% of contributions over limit	3.5%	2.1%	5.4%	3.9%	11.9%	6.5%
party organizations						
no. contributions over limit	70	60	10	6	73	51
% of contributions over limit	0.1%	0.1%	0.1%	0.1%	2.4%	1.7%
political committees						
no. contributions over limit	2	2	3	3	6	5
% of contributions over limit	0.4%	0.4%	1.9%	1.9%	0.6%	0.5%

* 1994 party numbers excludes contributions made to the Democratic Governors' Association (DGA). It was excluded because while the DGA only contributed to 3 candidates in Vermont, the report filed by the DGA was its report for the entire nation; thus all but a few contributions listed in their report were from outside of Vermont.

Explanation: This table contains the number and percent of contributions that would have been over the new contribution limits. To calculate the percent of contributions over the limits, the number of contributions over the limit were divided by the total number of itemized contributions plus an estimate of the unitemized contributions. Unitemized contributions were estimated by taking subtracting the total of itemized contributions from the candidates' total revenues and then dividing that total by 100 (the level at which contributions must be itemized). This method of estimating unitemized contributions is a conservative one and undoubtedly underestimates the number of unitemized contributions.

Table 3A

Effect of Contribution Limits on All Contributions to 1998 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	55.7%	146	7.8%	$170,721	49.9%	$342,403
Dwyer	41.1%	127	13.4%	$103,013	40.8%	$252,511
Rome		57	4.3%	$27,875	12.9%	$216,289
Lt. Governor						
Racine	48.6%	29	8.8%	$58,883	50.8%	$115,838
Snelling	48.1%	87	11.7%	$43,126	36.9%	$116,879
Secretary of State						
Markowitz	47.8%	24	3.1%	$7,947	15.2%	$52,300
Milne	45.2%	5	3.7%	$3,344	19.0%	$17,623
Treasurer						
Douglas	85.4%	0	0.0%	$0	0	$9,948
Auditor of Accounts						
Flanagan	52.2%	30	7.8%	$20,855	35.4%	$58,831
Dwinnell	38.9%	16	9.6%	$13,008	34.7%	$37,505
Attorney General						
Sorrell	83.8%	1	0.0%	$373	1.7%	$21,484

Table 4A

Effect of Contribution Limits on All Contributions to 1996 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	70.5%	193	10.6%	$197,717	50.0%	$395,424
Gropper	22.4%	18	12.9%	$25,700	56.2%	$45,698
Lt. Governor						
Racine	54.0%	29	3.8%	$19,247	17.8%	$108,274
Carroll	41.0%	109	15.7%	$56,175	31.9%	$176,052
Secretary of State						
Milne	81.4%	1	0.1%	$800	26.4%	$3,035
Treasurer						
Douglas	85.8%	0	0.0%	$0	0.0%	$8,583
Auditor of Accounts						
Flanagan	49.6%	40	12.9%	$23,855	30.1%	$79,352
Morressey	39.1%	14	9.9%	$3,450	11.5%	$30,025
Attorney General						
Amestoy	87.2%	4	9.3%	$3,400	37.3%	$9,110

Table 5A

Effect of Contribution Limits on All Contributions to 1994 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	68.6%	218	12.0%	$174,501	47.4%	$368,117
Kelly	19.0%	16	27.1%	$7,450	19.4%	$38,426
Lt. Governor						
Snelling	50.2%	72	7.9%	$21,950	14.7%	$149,813
Racine	46.8%	22	4.2%	$24,935	28.3%	$88,185
Secretary of State						
Milne	50.0%	2	1.6%	$581	3.1%	$18,946
Hooper	42.1%	29	42.0%	$9,550	32.0%	$29,875
Treasurer						
Douglas	91.4%	1	1.3%	$100	1.2%	$8,436
Auditor of Accounts						
Flanagan	52.0%	13	43.3%	$5,775	39.1%	$14,770
Thorn	38.5%	2	3.4%	$1,800	15.0%	$11,968
Attorney General						
Amestoy	87.1%	2	7.1%	$700	15.4%	$4,550

Table 6

Effect of Individual and Political Committee Contribution Limits on State Senate Candidates' Revenues

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost	Average lost per contribution
1998								
All candidates	$551,328	$7,450	$680,958	$9,202	$123,770	18.2%	$1,650	$107
Incumbents	$249,740	$8,919	$337,215	$12,043	$52,400	15.5%	$1,871	$130
Nonincumbents	$302,711	$6,441	$345,018	$7,341	$71,370	20.7%	$1,519	$95
Democrats	$229,523	$8,828	$266,485	$10,249	$68,066	25.5%	$2,618	$128
Republicans	$310,575	$9,705	$403,478	$12,609	$49,454	12.3%	$1,545	$88
1996								
All candidates	$492,064	$7,689	$496,076	$7,874	$53,478	10.8%	$677	$110
Incumbents	$144,802	$7,621	$153,015	$8,501	$17,474	11.4%	$874	$109
Nonincumbents	$324,600	$7,549	$315,758	$7,343	$35,704	11.3%	$626	$110
Democrats	$243,935	$8,131	$229,085	$7,636	$31,332	13.7%	$982	$142
Republicans	$222,359	$7,941	$236,473	$8,758	$21,344	9.0%	$689	$85
1994								
All candidates	$392,170	$5,853	$417,478	$6,844	$42,134	10.1%	$577	$63
Incumbents	$173,682	$8,271	$205,058	$10,793	$20,251	9.9%	$844	$81
Nonincumbents	$218,488	$4,750	$212,419	$5,058	$21,883	10.3%	$447	$52
Democrats	$150,337	$5,184	$145,895	$5,211	$16,806	11.5%	$542	$67
Republicans	$229,022	$8,179	$258,752	$9,952	$23,078	8.9%	$744	$59

Table 7A

Effect of Contribution Limits on All Contributions to State House Candidates

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost
1998							
All candidates	$369,110	$1,352	$466,023	$1,707	$105,730	22.7%	$402
Incumbents	$150,618	$1,177	$182,503	$1,426	$36,026	19.7%	$281
Nonincumbents	$218,492	$1,507	$283,520	$1,955	$69,704	24.6%	$516
Democrats	$143,897	$1,151	$168,681	$1,349	$28,659	17.0%	$245
Republicans	$203,960	$1,619	$272,336	$2,161	$72,638	26.7%	$576
Progressives	$7,960	$1,592	$11,478	$2,296	$1,200	10.5%	$150
Independents	$3,664	$733	$3,773	$755	$0	0	$0
1996							
All candidates	$236,855	$1,528	$245,825	$1,596	$30,337	12.3%	$100
Incumbents	$85,591	$1,451	$88,851	$1,506	$9,752	11.0%	$86
Nonincumbents	$239,141	$1,533	$248,620	$1,604	$20,585	8.3%	$108
Democrats	$126,731	$1,584	$125,557	$1,610	$17,010	13.5%	$122
Republicans	$103,156	$1,453	$112,618	$1,564	$12,352	11.0%	$87
Progressives	$6,903	$2,301	$8,245	$2,748	$350	4.2%	$39
Independents	$2,351	$1,176	$2,200	$1,100	$625	28.4%	$39
1994							
All candidates	$322,812	$1,448	$287,183	$1,282	$32,276	11.2%	$112
Incumbents	$67,423	$887	$140,023	$1,842	$7,021	5.0%	$64
Nonincumbents	$255,389	$1,737	$147,161	$994	$25,255	17.2%	$143
Democrats	$95,080	$980	$103,279	$1,054	$19,535	18.9%	$144
Republicans	$210,677	$2,150	$100,233	$1,023	$12,592	12.6%	$104
Progressives	$6,858	$2,286	$7,413	$2,471	$150	2.0%	$15
Independents	$6,832	$569	$7,667	$639	$0	0.0%	$0

Table 6A

Effect of Contribution Limits on All Contributions to State Senate Candidates

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost
1998							
All candidates	$551,328	$7,450	$680,958	$9,202	$192,287	28.2%	$2,564
Incumbents	$249,740	$8,919	$337,215	$12,043	$68,167	20.2%	$2,435
Nonincumbents	$302,711	$6,441	$345,018	$7,341	$124,120	36.0%	$2,641
Democrats	$229,523	$8,828	$266,485	$10,249	$75,266	28.2%	$2,895
Republicans	$310,575	$9,705	$403,478	$12,609	$106,571	26.4%	$3,330
1996							
All candidates	$492,064	$7,689	$496,076	$7,874	$74,222	15.0%	$940
Incumbents	$144,802	$7,621	$153,015	$8,501	$21,182	13.8%	$1,059
Nonincumbents	$324,600	$7,549	$315,758	$7,343	$52,740	16.7%	$925
Democrats	$243,935	$8,131	$229,085	$7,636	$38,268	16.7%	$1,196
Republicans	$222,359	$7,941	$236,473	$8,758	$35,152	14.9%	$1,134
1994							
All candidates	$392,170	$5,853	$417,478	$6,844	$74,235	17.8%	$1,017
Incumbents	$173,682	$8,271	$205,058	$10,793	$30,168	14.7%	$1,257
Nonincumbents	$218,488	$4,750	$212,419	$5,058	$44,067	20.7%	$899
Democrats	$150,337	$5,184	$145,895	$5,211	$21,336	14.6%	$688
Republicans	$229,022	$8,179	$258,752	$9,952	$50,649	19.6%	$1,634

Table 7

Effect of Individual and Political Committee Contribution Limits on State House Candidates' Revenues

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	average revenue lost	Average lost per contribution
1998								
All candidates	$369,110	$1,352	$466,023	$1,707	$30,290	6.5%	$115	$57
Incumbents	$150,618	$1,177	$182,503	$1,426	$14,562	8.0%	$114	$48
Nonincumbents	$218,492	$1,507	$283,520	$1,955	$15,728	5.5%	$117	$71
Democrats	$143,897	$1,151	$168,681	$1,349	$14,068	8.3%	$113	$58
Republicans	$203,960	$1,619	$272,336	$2,161	$14,927	5.5%	$118	$57
Progressives	$7,960	$1,592	$11,478	$2,296	$1,200	10.5%	$240	$150
Independents	$3,664	$733	$3,773	$755	$0	0	$0	$0
1996								
All candidates	$236,855	$1,528	$245,825	$1,596	$12,792	5.2%	$42	$24
Incumbents	$85,591	$1,451	$88,851	$1,506	$5,581	6.3%	$49	$39
Nonincumbents	$239,141	$1,533	$248,620	$1,604	$7,211	2.9%	$38	$19
Democrats	$126,731	$1,584	$125,557	$1,610	$6,446	5.1%	$45	$26
Republicans	$103,156	$1,453	$112,618	$1,564	$5,371	4.8%	$38	$22
Progressives	$6,903	$2,301	$8,245	$2,748	$350	4.2%	$88	$39
Independents	$2,351	$1,176	$2,200	$1,100	$625	28.4%	$48	$39
1994								
All candidates	$322,812	$1,448	$287,183	$1,282	$9,249	3.2%	$32	$20
Incumbents	$67,423	$887	$140,023	$1,842	$2,143	1.5%	$19	$13
Nonincumbents	$255,389	$1,737	$147,161	$994	$7,106	4.8%	$40	$24
Democrats	$95,080	$980	$103,279	$1,054	$3,718	3.6%	$27	$23
Republicans	$210,677	$2,150	$100,233	$1,023	$5,281	5.3%	$44	$20
Progressives	$6,858	$2,286	$7,413	$2,471	$150	2.0%	$50	$15
Independents	$6,832	$569	$7,667	$639	$0	0.0%	$0	$0

Table 8

Effect of Limits on the Number of Individual and Committee Contributions for Senate Candidates

Number of contributions over the limit	1994		1996		1998	
	# of candidates	Cumulative %	# of candidates	Cumulative %	# of candidates	Cumulative %
0	35	47.3%	37	46.3%	30	39.5%
1	11	62.2%	11	60.0%	7	48.7%
2	7	71.6%	11	73.8%	3	52.6%
3	8	82.4%	3	77.5%	4	57.9%
4-10	12	100.0%	18	100.0%	27	93.4%
11-16					5	100.0%

Table 9

Effect of Limits on the Number of Individual and Committee Contributions for House Candidates

Number of contributions over the limit	1994		1996		1998	
	# of candidates	Cumulative %	# of candidates	Cumulative %	# of candidates	Cumulative %
0	259	89.6%	252	82.6%	203	73.6%
1	19	96.2%	36	94.4%	34	85.9%
2	6	98.3%	10	97.7%	23	94.2%
3	3	99.3%	6	99.7%	9	97.5%
4-12	2	100.0%	1	100.0%	7	100.0%

Note: Tables 8 and 9 includes all nonparty contributions other than contribution a candidate makes to their own campaigns.

Table 10

Contributions by Contributor Type for Statewide Candidates: Itemized Contributions Only

	# over limit	% over limit	Total contributed	amount over limit	% of total over limit	average amt. over limit
1998						
Individuals	370	7.9%	$646,202	$201,373	31.2%	$43
businesses	74	38.9%	$94,786	$50,823	53.6%	$267
political committees	28	70.0%	$49,494	$35,644	72.0%	$891
party organizations	14	63.6%	$150,462	$143,271	95.2%	$6,512
1996						
individuals	275	14.8%	$415,005	$161,557	38.9%	$87
businesses	85	50.0%	$99,130	$52,667	53.1%	$312
political committees	49	80.3%	$106,314	$84,714	79.7%	$1,389
party organizations	7	46.7%	$47,825	$43,025	90.0%	$2,868
1994						
individuals	248	12.5%	$361,917	$122,992	34.0%	$62
businesses	95	55.2%	$119,703	$73,000	61.0%	$424
political committees	24	72.7%	$50,150	$39,300	78.4%	$1,191
party organizations	7	70.0%	$17,582	$13,950	79.3%	$1,395

Table 11

Contributions by Contributor Type for State House and Senate Candidates: Itemized Contributions Only

	# over limit	% over limit	total contributed	amount over limit	% of total over limit	average amt. over limit
1998						
Individuals	223	18.9%	$243,195	$74,770	30.7%	$63
Businesses	90	31.7%	$86,440	$25,500	29.5%	$90
political committees	55	34.6%	$65,698	$33,045	50.3%	$208
party organizations	202	74.3%	$174,922	$114,512	65.5%	$421
1996						
Individuals	135	23.8%	$135,439	$42,928	31.7%	$76
Businesses	21	22.3%	$25,017	$4,950	19.8%	$53
political committees	52	38.8%	$43,469	$14,998	34.5%	$112
party organizations	63	47.4%	$53,962	$26,896	49.8%	$202
1994						
individuals	125	18.3%	$132,813	$33,583	25.3%	$49
businesses	32	23.0%	$33,067	$7,996	24.2%	$58
political committees	22	29.7%	$25,425	$9,200	36.2%	$124
party organizations	71	59.7%	$66,235	$40,771	61.6%	$343

Table 12

Comparison of Missouri's Contribution Limits with Vermont's

	Contribution limit	Size of constituency	Ratio constituency to limit
Missouri statewide	$2,150	5,359,000	0.00040
Vermont statewide	$400	589,000	0.00068
Missouri senate	$1,050	157,600	0.00666
Vermont senate 1 seat	$300	19,600	0.01531
Vermont senate 3 seats	$300	58,800	0.00510
Vermont senate 6 seats	$300	117,800	0.00255
Missouri house	$550	32,877	0.01673
Vermont house 2 seats	$200	7,800	0.02564

Table 17

Campaign Expenditures, Statewide Candidates, 1998

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	55.7%	$435,273	$255,000	$180,273
Dwyer (R)	41.1%	$252,512	$300,000	-$47,488
Rome (R)		$216,413	$300,000	-$83,587
Berkey (Lib)	0.9%	$120	$300,000	-$299,880
Gottlieb (Lib Union)	0.5%	$0	$300,000	-$300,000
Williams (VG)	1.5%	$0	$300,000	-$300,000
Lt. Governor				
Racine (D)	48.6%	$114,538	$85,000	$29,538
Snelling (R)	48.1%	$117,611	$100,000	$17,611
Faeterri (Lib)	0.6%	$0	$100,000	-$100,000
Newton (Lib Union)	0.7%	$0	$100,000	-$100,000
Coleman (VG)	1.8%	$0	$100,000	-$100,000
Secretary of State				
Markowitz (D)	47.8%	$58,282	$45,000	$13,282
Milne (R)	45.2%	$15,240	$38,250	-$23,010
Richmond (Lib)	2.9%	$100	$45,000	-$44,900
Lane (VG)	3.9%	$153	$45,000	-$44,847
Treasurer				
Douglas (R/D)	85.4%	$2,521	$38,250	-$35,729
Baker (Lib)	3.6%	$0	$45,000	-$45,000
Linskey (Lib Union)	4.7%	$0	$45,000	-$45,000
Bushey (VG)	6.0%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	52.2%	$58,239	$38,250	$19,989
Dwinnell (R)	38.9%	$63,309	$45,000	$18,309
Baker (Lib)	2.8%	$142	$45,000	-$44,858
Jackowski (Lib Union)	2.9%	$0	$45,000	-$45,000
Saetta (VG)	3.0%	$0	$45,000	-$45,000
Attorney General				
Sorrell (D)	83.8%	$11,431	$38,250	-$26,819
Costanzo (Lib)	4.5%	$1,231	$45,000	-$43,769
Fisher (Lib Union)	2.5%	$0	$45,000	-$45,000
Ward (VG)	8.8%	$0	$45,000	-$45,000

Table 18

Campaign Expenditures, Statewide Candidates, 1996

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	70.5%	$191,203	$255,000	-$63,797
Gropper (R)	22.4%	$46,244	$300,000	-$253,756
Randall (Lib)	1.1%	$10,284	$300,000	-$289,716
Herbert (Lib Union)	1.6%	$454	$300,000	-$299,546
Lane (VG)	1.4%	$556	$300,000	-$299,444
St. John (I)	1.2%	$6,472	$300,000	-$293,528
Brunelle (Nat Law)	1.3%	$0	$300,000	-$300,000
Lt. Governor				
Racine (D)	54.0%	$138,418	$100,000	$38,418
Carroll (R)	41.0%	$171,690	$100,000	$71,690
Ngoima (Lib Union)	1.0%	$0	$100,000	-$100,000
Coleman (VG)	2.1%	$206	$100,000	-$99,794
Bate (Nat Law)	1.6%	$0	$100,000	-$100,000
Secretary of State				
Milne (R/D)	81.4%	$1,878	$38,250	-$36,372
Costanzo (L)	3.1%	$311	$45,000	-$44,689
Levy (Lib Union)	3.3%	$0	$45,000	-$45,000
De Pierro (VG)	7.4%	$13	$45,000	-$44,987
Wilder (Nat Law)	4.5%	$0	$45,000	-$45,000
Treasurer				
Douglas (R/D)	85.8%	$4,826	$38,250	-$33,424
Gottlieb (Lib Union)	3.5%	$0	$45,000	-$45,000
Bushey (VG)	7.0%	$0	$45,000	-$45,000
Bate (Nat Law)	3.4%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	49.6%	$57,248	$38,250	$18,998
Morrissey (R)	39.1%	$26,928	$45,000	-$18,072
Baker (L)	2.3%	$513	$45,000	-$44,487
Davenport (Lib Union)	2.5%	$0	$45,000	-$45,000
Sweet (VG)	4.6%	$0	$45,000	-$45,000
McLaud (Nat Law)	1.5%	$0	$45,000	-$45,000
Attorney General				
Amestoy	87.2%	$3,987	$38,250	-$34,263
Diamondstone (Lib U)	3.5%	$0	$45,000	-$45,000
Kingston (VG)	6.0%	$0	$45,000	-$45,000
Huston (Nat Law)	3.0%	$0	$45,000	-$45,000

Table 19

Campaign Expenditures, Statewide Candidates, 1994

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	68.6%	$183,300	$255,000	-$71,700
Kelly (R)	19.0%	$36,268	$300,000	-$263,732
Gottlieb (Lib Union)	0.8%	$0	$300,000	-$300,000
Lane (VG)	1.0%	$714	$300,000	-$299,286
Brunelle (Nat Law)	0.7%	$0	$300,000	-$300,000
Jaccaci (People VT)	0.9%	$720	$300,000	-$299,280
Brueckner (I)	0.9%	$0	$300,000	-$300,000
Morse (I)	7.0%	$113,427	$300,000	-$186,573
Lt. Governor				
Snelling (R)	50.2%	$115,719	$100,000	$15,719
Racine (D)	46.8%	$106,735	$100,000	$6,735
Haas (Lib Union)	1.3%	$0	$100,000	-$100,000
Bate (Nat Law)	1.4%	$0	$100,000	-$100,000
Secretary of State				
Milne (R)	50.0%	$26,733	$45,000	-$18,267
Hooper (D)	42.1%	$39,743	$38,250	$1,493
Herbert (Lib Union)	4.6%	$0	$45,000	-$45,000
Padilla (Nat Law)	3.0%	$0	$45,000	-$45,000
Treasurer				
Douglas (D)	91.4%	$4,485	$38,250	-$33,765
Ngoima (Lib Union)	3.6%	$0	$45,000	-$45,000
Schumacher (Nat Law)	4.8%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	52.0%	$32,383	$45,000	-$12,617
Thorn (R)	38.5%	$11,698	$45,000	-$33,302
Davenport (Lib Union)	3.9%	$0	$45,000	-$45,000
McLaud (Nat Law)	1.7%	$0	$45,000	-$45,000
Redden (VG)	3.6%	$0	$45,000	-$45,000
Attorney General				
Amestoy (R/D)	87.1%	$3,373	$38,250	-$34,877
Diamondstone (Lib U)	5.5%	$0	$45,000	-$45,000
Mulchay (Nat Law)	3.7%	$0	$45,000	-$45,000
Talcott (VG)	3.4%	$0	$45,000	-$45,000

Table 20

Campaign Expenditures State Senate Candidates

	Total spent on campaigns	Average spent	Spending Limit	Ave. spent minus limit
1998				
All candidates	$551,328	$7,450		
Incumbents	$249,740	$8,919		
Nonincumbents	$302,711	$6,441		
Democrats	$229,523	$8,828		
Republicans	$310,575	$9,705		
1 seat	$40,365	$5,766	$4,000	$1,766
2 seats	$163,143	$5,827	$6,500	-$673
3 seats	$194,937	$8,122	$9,000	-$878
6 seats	$152,883	$10,192	$16,500	-$6,308
1996				
All candidates	$492,064	$7,689		
Incumbents	$144,802	$7,621		
Nonincumbents	$324,600	$7,549		
Democrats	$243,935	$8,131		
Republicans	$222,359	$7,941		
1 seat	$23,347	$5,837	$4,000	$1,837
2 seats	$130,024	$5,910	$6,500	-$590
3 seats	$144,475	$6,880	$9,000	-$2,120
6 seats	$171,556	$11,437	$16,500	-$5063
1994				
All candidates	$392,170	$5,853		
Incumbents	$173,682	$8,271		
Nonincumbents	$218,488	$4,750		
Democrats	$150,337	$5,184		
Republicans	$229,022	$8,179		
1 seat	$21,147	$4,229	$4,000	$229
2 seats	$101,427	$4,057	$6,500	-$2,443
3 seats	$147,660	$6,152	$9,000	-$2,848
6 seats	$121,937	$9,380	$16,500	-$7,120

Table 21

Campaign Expenditures House Candidates

	Total spent on campaigns	Average spent	Expenditure limits	Ave. Spent minus limit
1998				
All candidates	$369,110	$1,352	$2,000	-$648
Incumbents	$150,618	$1,177	$1,800	-$623
Nonincumbents	$218,492	$1,507	$2,000	-$493
Democrats	$143,897	$1,151	$2,000	-$849
Republicans	$203,960	$1,619	$2,000	-$381
Progressives	$7,960	$1,592	$2,000	-$408
Independents	$3,664	$733	$2,000	-$1,267
1 seat	$193,811	$1,526	$2,000	-$474
2 seats	$175,299	$1,201	$3,000	-$1,799
1996				
All candidates	$236,855	$1,528	$2,000	-$472
Incumbents	$85,591	$1,451	$1,800	-$349
Nonincumbents	$239,141	$1,533	$2,000	-$467
Democrats	$126,731	$1,584	$2,000	-$416
Republicans	$103,156	$1,453	$2,000	-$547
Progressives	$6,903	$2,301	$2,000	$301
Independents	$2,351	$1,176	$2,000	-$824
1 seat	$125,703	$1,676	$2,000	-$324
2 seats	$111,152	$1,389	$3,000	-$1,611
1994				
All candidates	$322,812	$1,448	$2,000	-$552
Incumbents	$67,423	$887	$1,800	-$913
Nonincumbents	$255,389	$1,737	$2,000	-$263
Democrats	$95,080	$980	$2,000	-$1,020
Republicans	$210,677	$2,150	$2,000	$150
Progressives	$6,858	$2,286	$2,000	$286
Independents	$6,832	$569	$2,000	-$1,431
1 seat	$192,936	$2,010	$2,000	$10
2 seats	$129,876	$1,023	$3,000	-$1,977

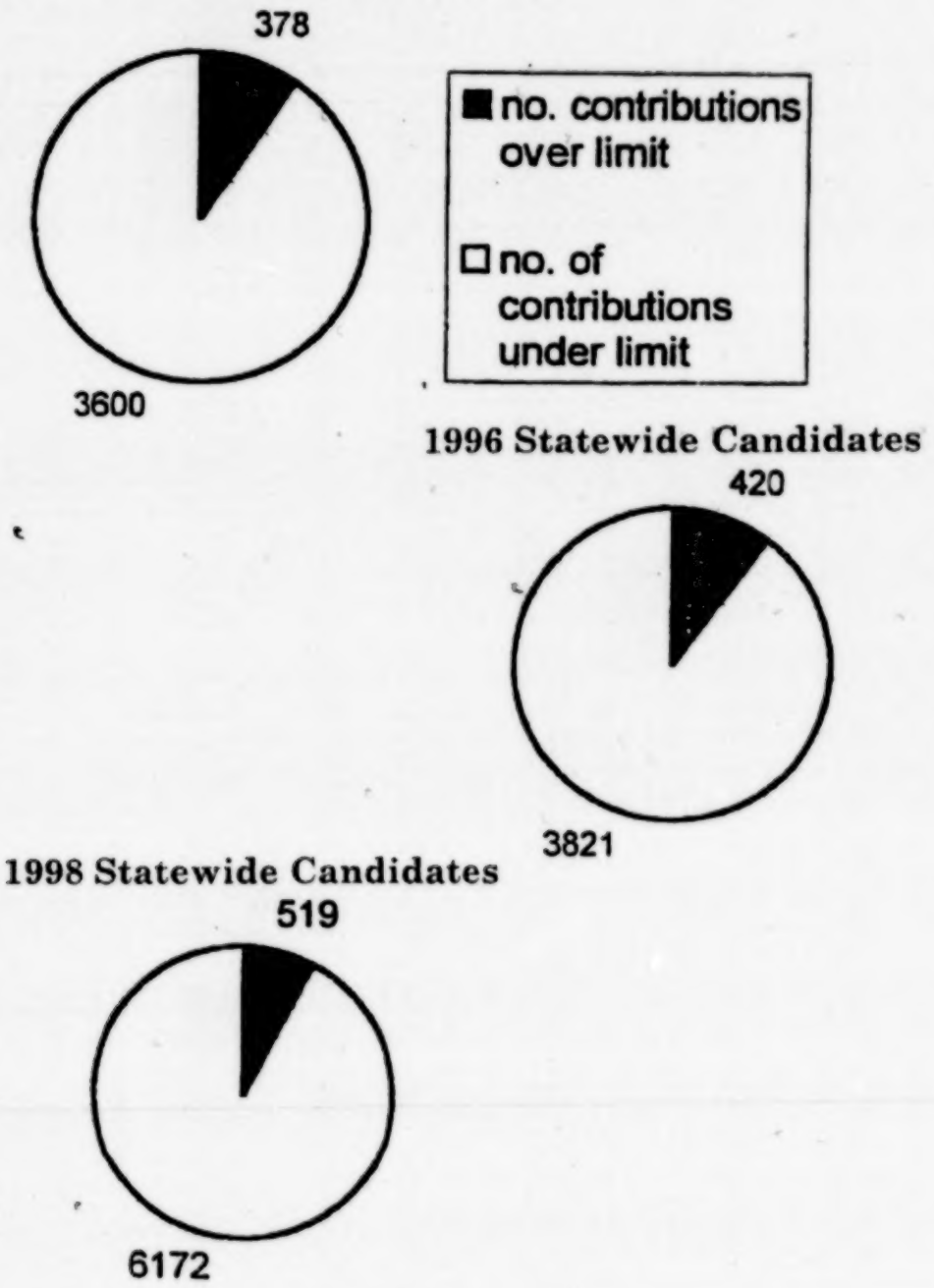

Figure 1s: Contributions to statewide candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

Table 13

Effect of Out of State Limits on Statewide Candidates' Revenues, 1998

	Vote %	Total revenue	Out of state contributions	% of total Revenue
Governor				
Dean	55.7%	$342,403	$144,706	42.3%
Dwyer	41.1%	$252,511	$49,150	19.5%
Lt. Governor				
Racine	48.6%	$115,838	$9,341	8.1%
Snelling	48.1%	$116,879	$14,555	12.5%
Secretary of State				
Markowitz	47.8%	$52,300	$14,614	27.9%
Milne	45.2%	$17,623	$5,994	34.0%
Treasurer				
Douglas	85.4%	$9,948	$0	0.0%
Auditor of Accounts				
Flanagan	52.2%	$58,831	$39,006	66.3%
Dwinnell	38.9%	$37,505	$6,300	16.8%
Attorney General				
Sorrell	83.8%	$21,484	$383	1.8%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1998.

Table 14

Effect of Out of State Limits on Statewide Candidates' Revenues, 1996

	Vote %	Total revenue	Out of state contributions	% of total revenue
Governor				
Dean	70.5%	$395,424	$205,659	52.0%
Gropper	22.4%	$45,698	$4,350	9.5%
Lt. Governor				
Racine	54.0%	$108,274	$2,500	2.3%
Carroll	41.0%	$176,052	$32,275	18.3%
Secretary of State				
Milne	81.4%	$3,035	$0	0.0%
Treasurer				
Douglas	85.8%	$8,583	$0	0.0%
Auditor of Accounts				
Flanagan	49.6%	$79,352	$35,485	44.7%
Morrissey	39.1%	$30,025	$1,900	6.3%
Attorney General				
Amestoy	87.2%	$9,110	$5,100	56.0%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1996.

Table 15

Effect of Out of State Limits on Statewide Candidates' Revenues, 1994

	Vote %	Total revenue	Out of state contributions	% of total revenue
Governor				
Dean	68.6%	$368,117	$223,739	60.8%
Kelly	19.0%	$38,426	$750	2.0%
Lt. Governor				
Snelling	50.2%	$149,813	$15,650	10.4%
Racine	46.8%	$88,185	$2,400	2.7%
Secretary of State				
Milne	50.0%	$18,946	$800	4.2%
Hooper	42.1%	$29,875	$13,900	46.5%
Treasurer				
Douglas	91.4%	$8,436	$0	0.0%
Auditor of Accounts				
Flanagan	52.0%	$14,770	$10,125	68.6%
Thorn	38.5%	$11,968	$450	3.8%
Attorney General				
Amestoy	87.1%	$4,550	$1,750	38.5%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1994 except for Thomas Morse (I) who received $28 (or 2% of his revenues) from out of state.

Table 16

Effect of Out of State Limits on State Senate and House Candidates' Revenues

		average revenues from out of state	average % out of state
Senate			
	1994	$552	7.5%
	1996	$514	9.0%
	1998	$114	0.9%
House			
	1994	$27	1.7%
	1996	$48	2.6%
	1998	$69	2.2%

Note: the 1998 "average % out of state" cells were calculated differently from the 1994 and 1996 due to data limitations. The 1998 average % is actually the % of total revenue raised from out of state sources. Both methods result in similar numbers for 1994 and 1996. The 0.9% for 1998 does represent a significant drop in identifiable out of state contributions.

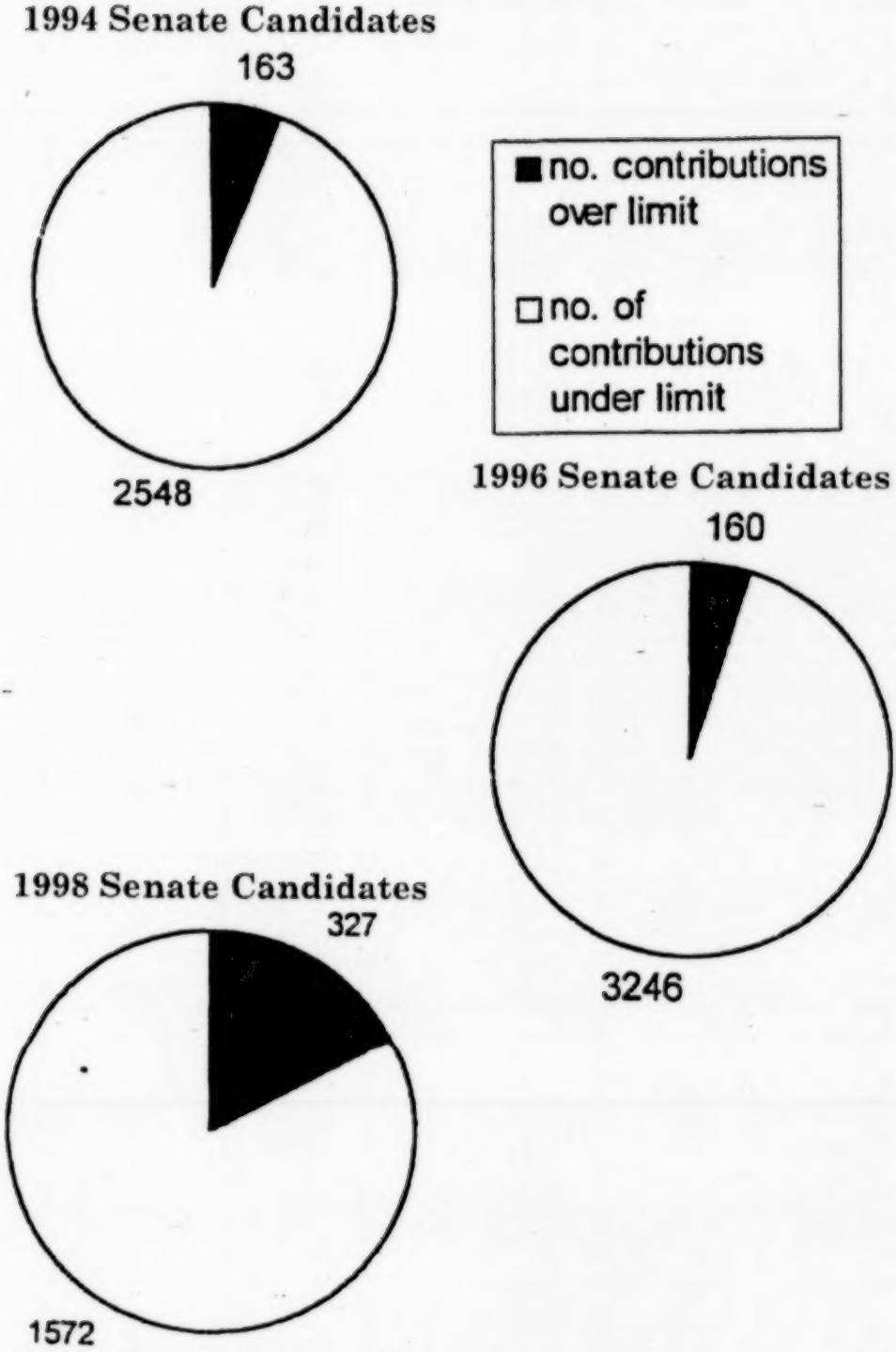

Figure 2s: Contributions to senate candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

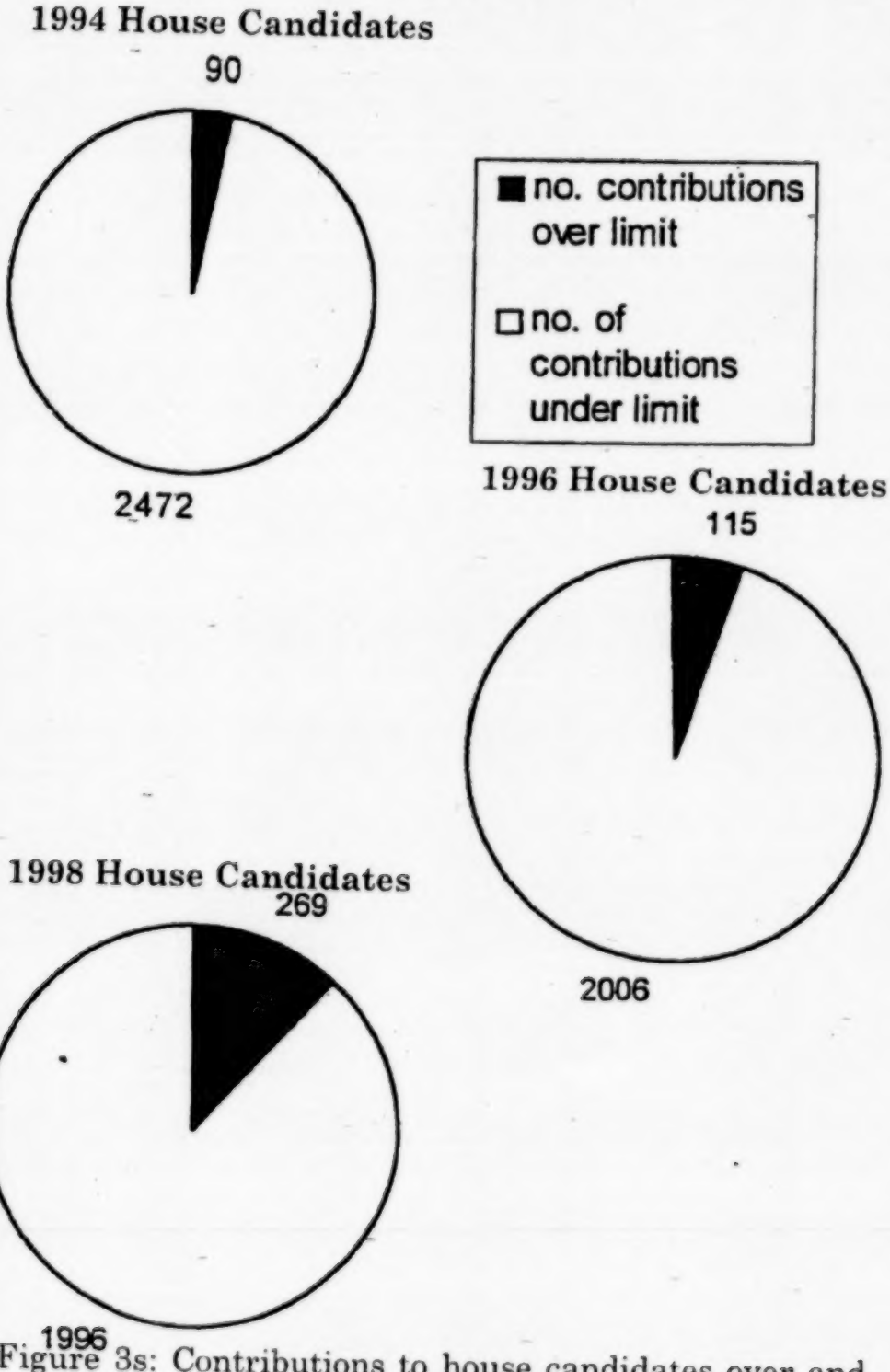

Figure 3s: Contributions to house candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

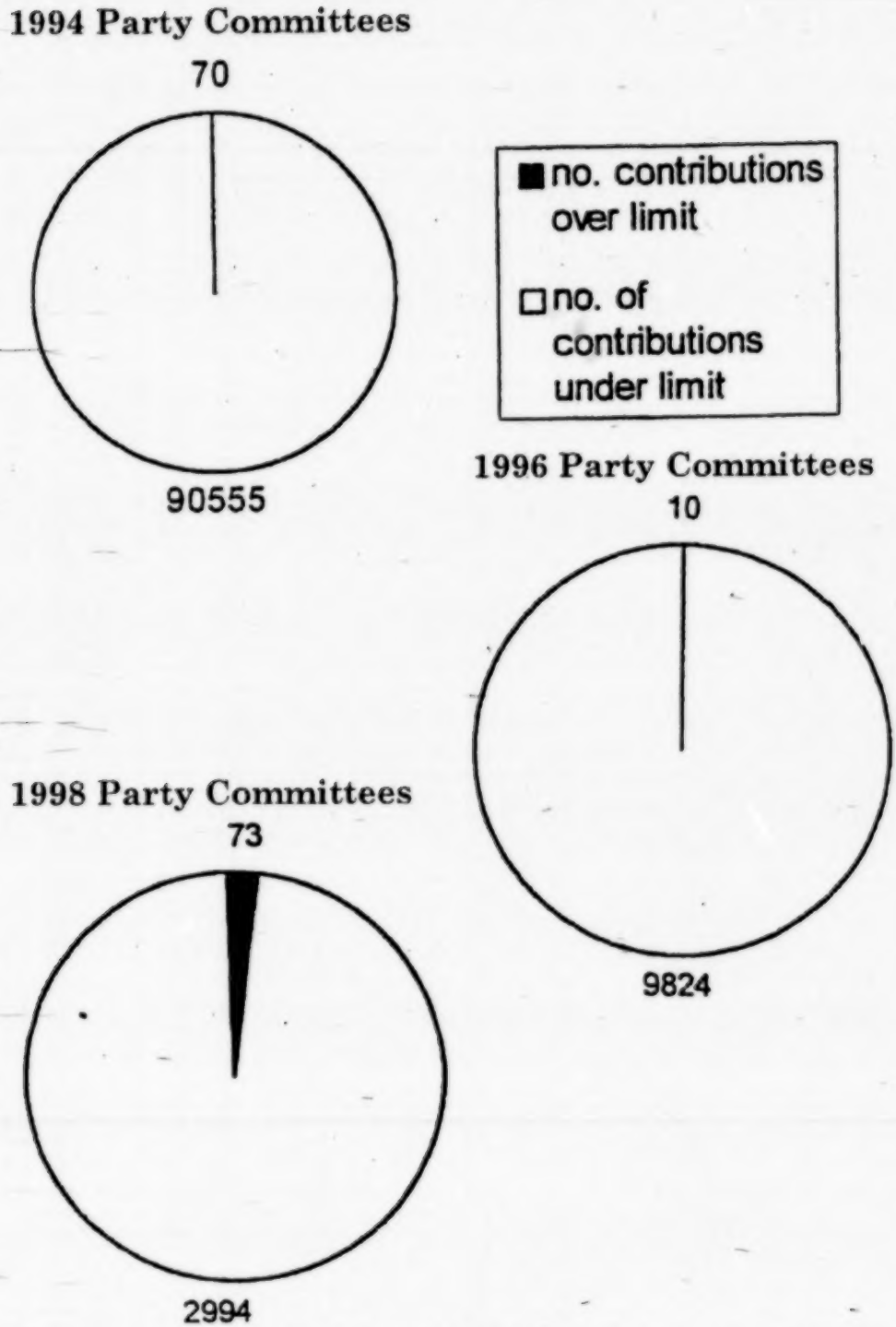

Figure 4s: Contributions to political party committees over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

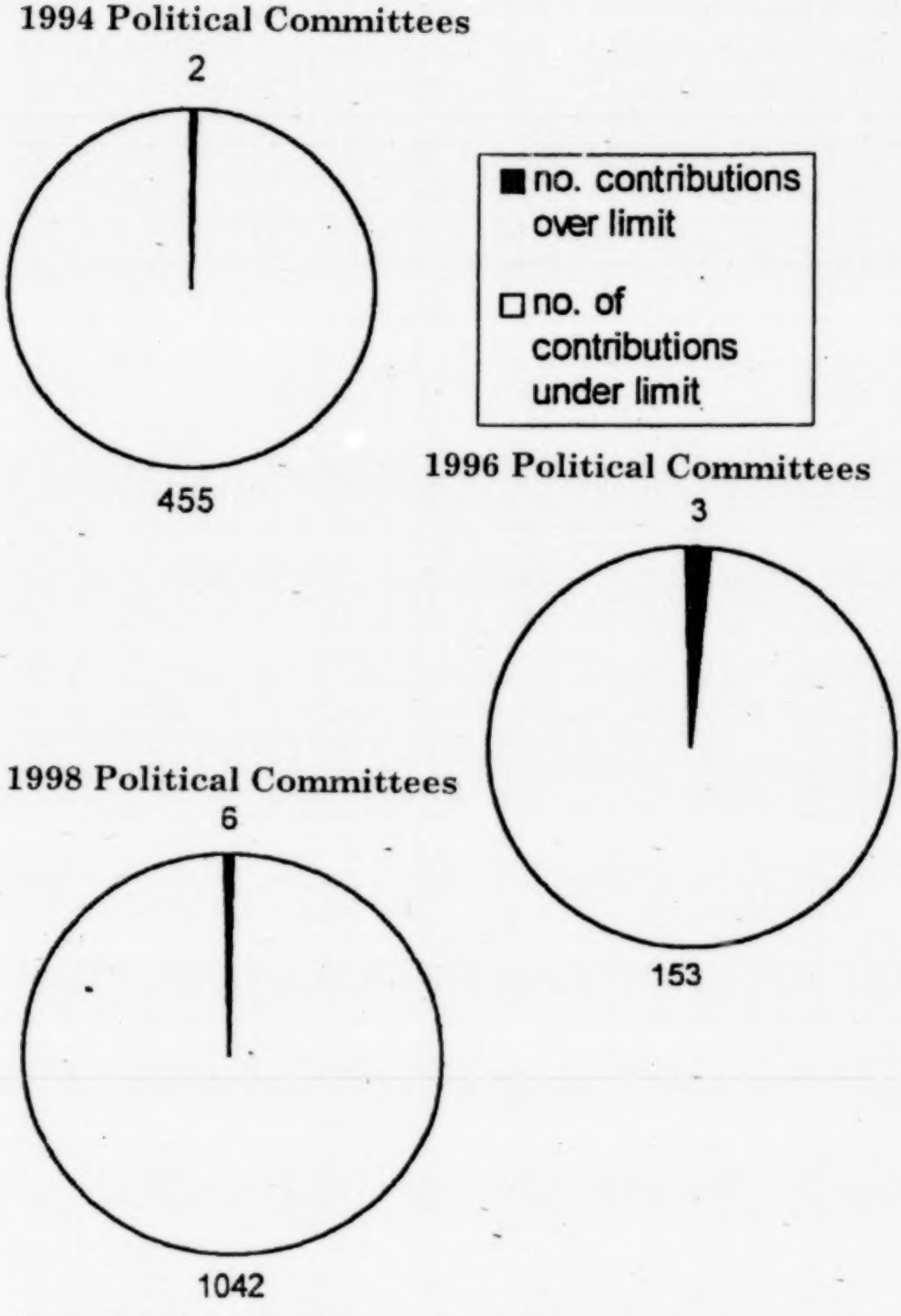

Figure 5s: Contributions to political committees over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

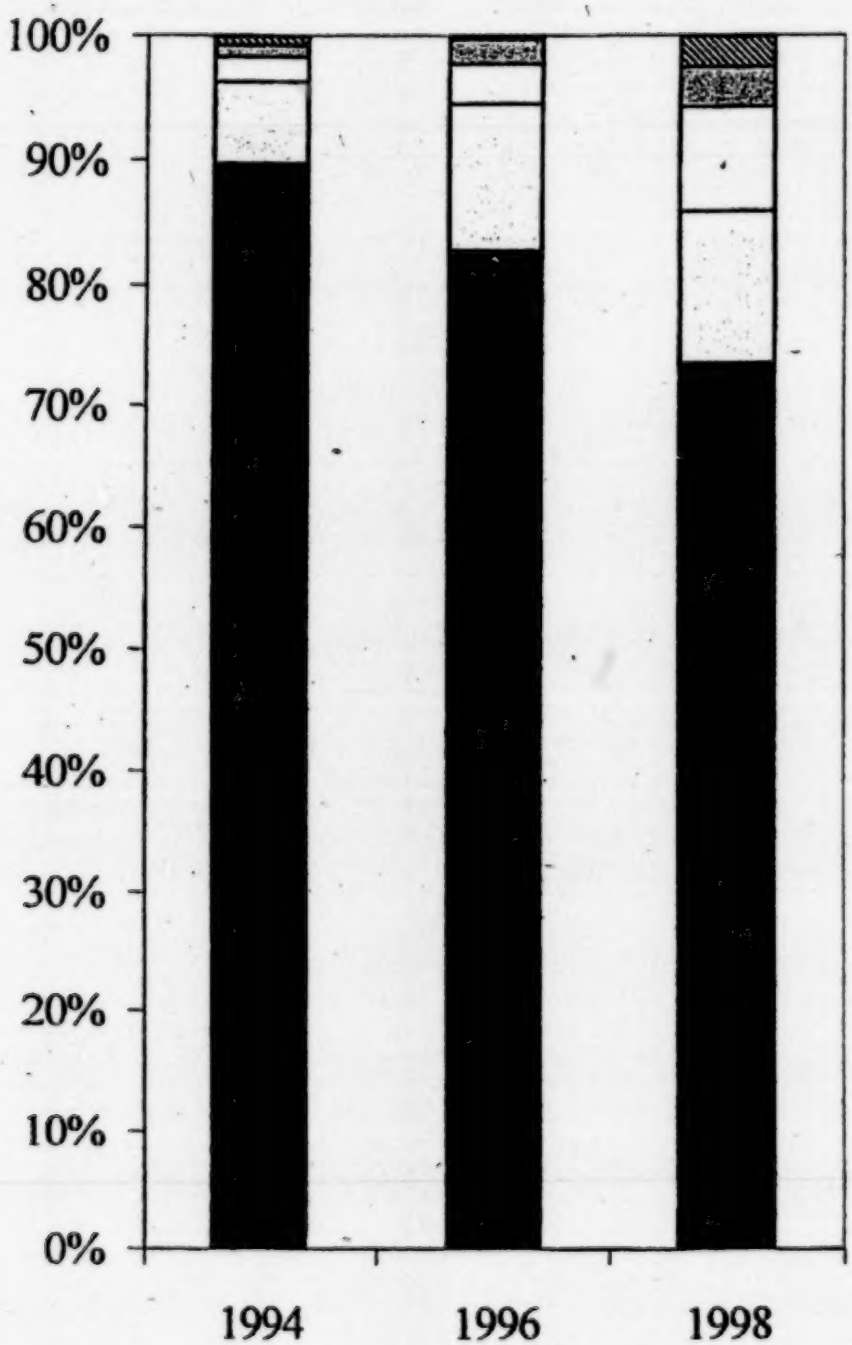

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Figure: House Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

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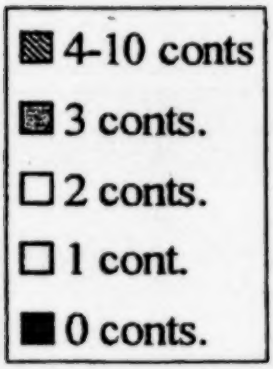

Figure: House Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

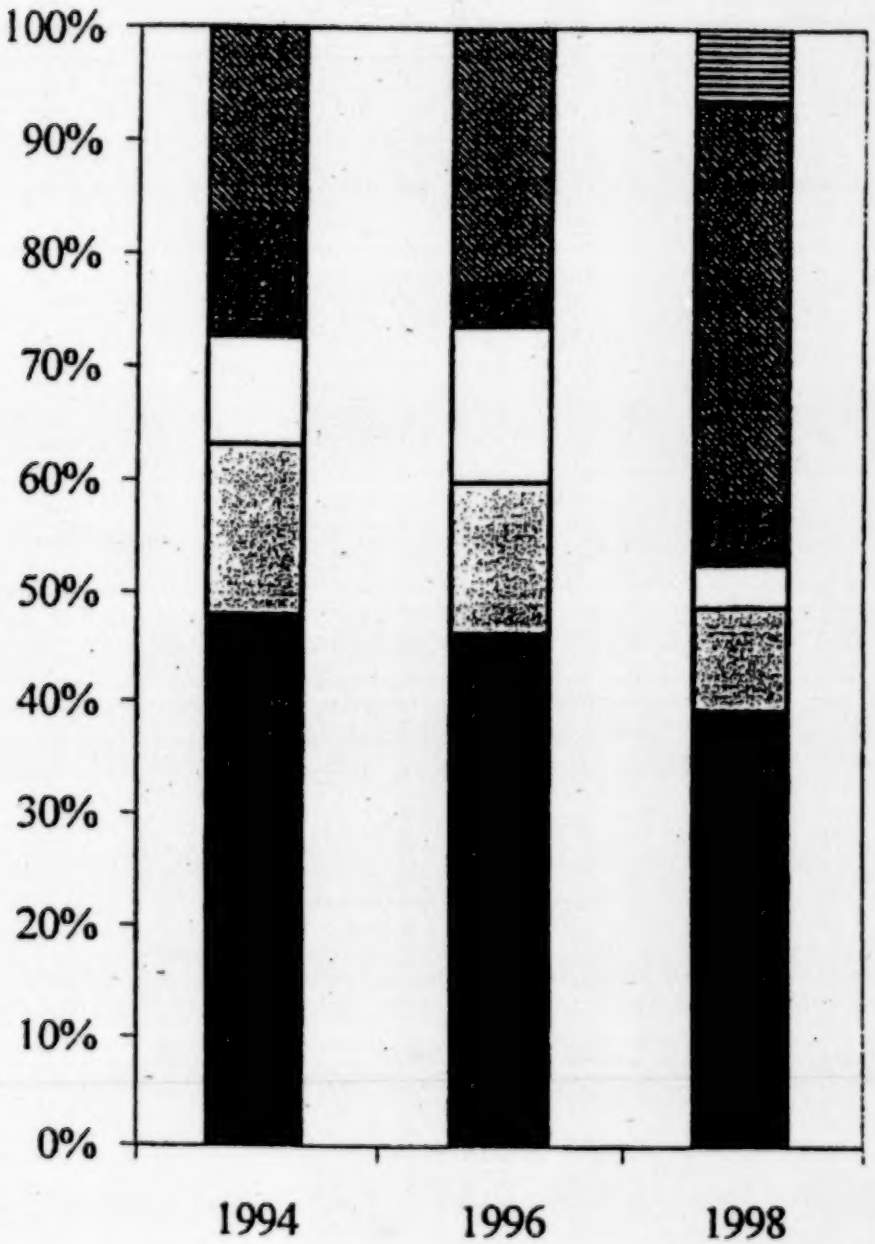

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Figure: Senate Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

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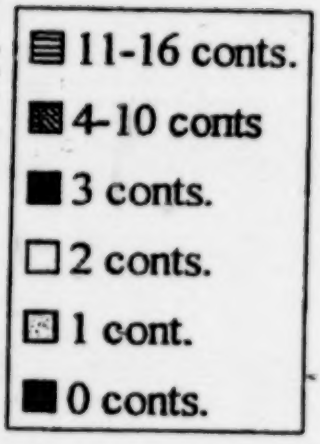

Figure: Senate Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of May, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

- - v. - -

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO,

DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

ORDER

Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing en banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case en banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing en banc, rehearing en banc was **DENIED** by order of the court filed on February 11, 2005, and amended on April 11, 2005, and April 20, 2005.

The court hereby **AMENDS** that order to reflect that, upon, consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was **DENIED.** Judge Winter dissents from the denial of rehearing.

The court also **AMENDS** the February 11, 2005, order to reflect (1) the opinions concurring in the court's denial of rehearing en banc filed by Judge Calabresi, Judges Straub and Pooler, and Judges Sack and Katzmann, and (2) the opinions dissenting from the court's denial of rehearing en banc filed by Chief Judge Walker, Judge Jacobs, Judge Cabranes, and Judge Raggi.

Judges Calabresi, Straub, Pooler, Sack, Sotomayor, Katzmann, and B.D. Parker concur in the denial of rehearing en banc. Chief Judge Walker and Judges Jacobs, Cabranes, Raggi, and Wesley dissent from the denial of rehearing en banc. With this order, Judge Calabresi is filing a concurring opinion; Judges Straub and Pooler are filing a concurring opinion; Judges Sack and Katzmann are filing a concurring opinion, in which Judges Sotomayor and B.D. Parker join; Chief Judge Walker is filing a dissenting opinion, in which Judge Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join; and Judge Raggi is filing a dissenting opinion.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

CALABRESI, *Circuit Judge*, concurring in the denial of rehearing en banc.

I.

The prudential reasons given in the thoughtful opinion of Judge Sack and Judge Katzmann, *infra* at 14, would, in themselves, justify concurring in a denial of a rehearing en banc. I write separately, though, because I have an additional and rather different reason for voting against such a rehearing.

It seems to me that there are two principal values at play in the campaign finance debate. One is the desire to let individuals express the intensity of their political feelings, and to do so in a very particular way — that is, through money in the form of either campaign expenditures or contributions. This value has been consistently treated as deserving of First Amendment protection. *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. 93, 134-38 (2003); *Buckley v. Valeo*, 424 U.S. 1, 19-22 (1976). Nonetheless, it is not absolute. For example, no one argues that a state is precluded from prohibiting the purchase of votes, even though buying votes amounts to the most direct way in which intensity of feeling can be expressed through the use of money. *See* 42 U.S.C. § 1973i(c). *Cf. Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982).[1]

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[1]One could argue that *Buckley* expressed skepticism toward characterizing "intensity" of political feeling, as manifested by the amount of money spent, as an *independent* First Amendment value. Thus, with respect to political contributions, *Buckley* stated that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Moreover, even with respect to campaign *expenditures*, much of *Buckley's* focus was on the impact that restricting the purchase of speech, by a candidate or other advocate, would have on the "marketplace of ideas," rather than on

The other value is the deeply felt desire not to have the wealthy be able to influence elections more than the poor.[2] This value, however, has two distinct aspects. The first is the generalized egalitarian desire not to advantage one group in society over another. The second — which is inextricably linked to the "intensity of expression" value and hence partakes of its First Amendment attributes — is that, given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially,

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the diminishment of the speaker's unilateral right to communicate his or her belief, and the intensity thereof. *See, e.g., id.* at 19-20, 47-48, 52-53.

Nevertheless, and at times in tension with its statements concerning "undifferentiated, symbolic" acts of contribution, the *Buckley* Court clearly stated that the *quantity* and *volume* of individual political expression through contributions *and* expenditures was a protected First Amendment interest. Thus, in invalidating limitations on independent expenditures (often made by PACs), *Buckley* noted that the restrictions "preclude[d] most associations from *effectively amplifying the voice of their adherents*," and therefore were not only an interference with the groups' speech rights, but were "simultaneously an interference with the freedom of (their) adherents." *Id.* at 22 (internal quotations and citation omitted) (emphasis added). *Buckley* also said that spending caps directly interfere with the spender's "right to speak" his or her mind and "to engage in vigorous advocacy" in the course of an election, and it described these as rights that are "no less entitled to protection under the First Amendment than the discussion of political policy generally." *Buckley*, 424 U.S. at 48 (internal quotations and citations omitted); *see also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more that $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.").

[2]My "wealthy" and "poor" nomenclature is, of course, shorthand. The same analysis applies with as great of force to members of the middle class.

a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person. *Cf. Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-58 (1986) (discussing the "threat" posed to the "political marketplace" by corporate spending where "[t]he resources in the treasury of a business corporation" do not directly correlate to intensity of "popular support for the corporation's political ideas"). This way of looking at things is anything but new. *See, e.g., Luke* 21:3-4 (English Standard Version) ("Truly, I tell you, this poor widow has put in more than all of them. For they all contributed out of their abundance, but she out of her poverty put in all she had to live on.").[3] Significantly, though, this second aspect is reflective not only of egalitarian concerns, but as much of First Amendment libertarian ones.

The notion that intensity of desire is not well-measured by money in a society where money is not equally distributed has been, since *Buckley*, the huge elephant — and donkey — in the living room in all discussions of campaign finance reform. *Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. *Buckley*, 424 U.S. at 17, 48-49. And yet, I submit, it remains at least implicitly behind

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[3] *See also Buckley*, 424 U.S. at 21-22 & n.22 (noting that "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate," and that "[o]ther factors relevant to an assessment of the 'intensity' of the support indicated by a contribution include the contributor's financial ability and his past contribution history."). *But see id.* at 56 (observing that unlimited campaign expenditures are appropriate in part because, given contribution limitations, "the financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support").

much campaign finance reform legislation.

The odd thing about *Buckley's* exclusion of this interest from the field of discussion is that, as mentioned above, this concern is in part directly linked to the Supreme Court's asserted First Amendment concern — the desire to protect the right for people to express, in money terms, the intensity of their political ideas and affiliations. It may be that the High Court's failure to recognize this fact occurred because the Court in *Buckley* focused its attention on the desire not to favor one group, the rich, over another, the poor — or vice versa, *see id.* at 48-49. And, in deciding not to give weight to that value, the Court failed to realize that it was also excluding — as a potentially compelling state interest — the First Amendment right to have one's intensity of desire, as expressed in monetary terms, be measured equally.

Be that as it may, the *Buckley* framework, which establishes that the desire to express intensity of political position through money is fundamental, at the same time prohibits the states from seeking to find a way of gauging and treating intensity of desire equally among its citizens, rich and poor.[4] As a result of this odd decision, the

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[4]Of course, it remains true that money is not the only means by which intensity of political belief may be expressed. In light of this obvious fact, it may perhaps be asserted that there is no compelling interest in giving individuals who lack financial resources an ability equal to that afforded to wealthier individuals to express intensity of feeling in the monetary marketplace of political discourse. But then the converse must also be true. That is, people or entities of means, whose contributions and expenditures campaign finance legislation might seek to limit, also enjoy alternate mechanisms for expressing the intensity of their political beliefs. And, if there is nothing uniquely important, in a First Amendment context, about expressing intensity of belief in monetary terms for those who do not have money, the same must presumably be true for those who do. In either case, though, the centrality of money in political campaigns makes it a uniquely important mechanism by which intensity of political belief is expressed. *Cf. Buckley*, 424 U.S. at 18 n.17 (observing that the

judicial discussion since *Buckley* has centered on other values, which, though by no means unimportant, are, I believe, not really at the core of the debate. There is much talk of "corruption" and what controls are necessary to avoid it, and of the danger that what is done under the guise of controlling corruption may be used to protect incumbents. There is, likewise, concern about the cost of fundraising and similar factors. I do not mean to suggest that these are not serious questions. But a treatment of campaign financing that focuses primarily on those issues is surely impoverished, for it does not deal with what is at least as important, and, perhaps, at the very heart of the problem.

Indeed, because of *Buckley*, even academicians have focused on campaign finance reform primarily in the light of these subsidiary goals. Thus, some have tried to "solve" the campaign finance problem by providing for anonymous contributions. *See, e.g.*, Ian Ayres & Jeremy Bulow, The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence, 50 Stan. L. Rev. 837 (1988). But that does nothing to ameliorate the fact that "intensity of desire" under *Buckley* depends on the underlying wealth of the donor, and hence is measured by a rubber yard stick. And this is so regardless of whether the donation is made openly or secretly. Others, trying to avoid corruption and protection of incumbents, and also to counter the advantage *Buckley* gave to the rich, seek to overwhelm individual contributions with

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argument that "just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment," so too may the "volume of dollars in political campaigns" be constitutionally restricted "underscores a fundamental misconception. The decibel restriction . . . limit[s] the manner of operating a soundtruck but not the extent of its proper use. By contrast, the [Federal Election Campaign] Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information.").

massive funds made available to everyone for campaign spending. *See, e.g.*, Bruce Ackerman, Crediting the Voters: A New Beginning for Campaign Finance Reform, Am. Prospect, Spring 1993, at 71; Edward B. Foley, Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance Reform, 94 Colum. L. Rev. 1204 (1994). But they do so in a way that undercuts the capacity of people, *both* poor and rich, to give financial expression to the relative intensity of their desire. Moreover, even the most sophisticated "hybrid" campaign finance proposals, in advocating complex combinations of donor anonymity, public funding, and controlled private giving, do not directly address this difficulty. *See, e.g.*, Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance 25-44 (2002).

Solutions that take into account both (a) the perceived need to protect the right to express one's intensity of desire in political matters through (among other mechanisms) money, and, at the same time, (b) the wish to measure and give effect to that intensity of desire in a way that is fair to the rich and the poor alike, are not obvious. Some potentially fruitful, if logistically challenging, suggestions have been made in other contexts. *See, e.g.*, Philip Bobbit & Guido Calabresi, Tragic Choices 98-117 (1978) (discussing possibilities and limitations of wealth-distribution-neutral markets). But it remains the case that the finding of such solutions in the world of campaign financing has been, and will continue to be, severely hampered if the discussion taking place in legislatures and courthouses is centered — as it now is — not on the problem, but on collateral issues.

This is so, moreover, even if one considers those issues that I described as "collateral" — corruption, incumbent protection, fundraising, time, etc. — to be, themselves, of primary importance. Efforts to tailor all campaign finance reform to corruption — the one state interest

heretofore recognized by the Supreme Court as sufficiently compelling to justify spending restrictions of any sort[5] — surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box.

II.

I believe that it is not out of the question that Vermont, in passing Act 64, was as likely to be concerned with the goal of enabling of all Vermonters — be they political candidates or political contributors — to have something of an "equal" opportunity to express intensity of political desire, as it was with the possibility of corruption, saving time, or on the alleged desire to protect incumbents. *Cf. Landell v. Sorrell*, 382 F.3d 91, 100-02 (2d Cir. 2004) (setting forth legislative findings in support of Act 64, including: (1) that "[a]s a result [of the rising cost of campaigns] many Vermonters are financially unable to seek election to public office"; (2) that "large contributors" gain time and access to candidates to an extent that "those who make small or no contributions" do not; and (3) that "public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates"). Indeed, I think that in Vermont, no less than in other places, interests and values such as corruption and time-saving are often defined in expansive ways so as to allow the introduction (under *Buckley*'s doctrinal radar) of values that are directly related (1) to the wish to protect the right to express through money the intensity of one's desire, and (2) to make sure that

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[5] *Cf. National Conservative Political Action Committee*, 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling interests *thus far identified* for restricting campaign finances." (emphasis added)).

that intensity is not measured differently for rich and for poor.[6]

I cannot help but suspect, however, that the sort of conversation taking place in Vermont (and elsewhere) would be a far more fruitful one — from the standpoints both of campaign finance policy and constitutional jurisprudence — were it able to be brought out from under *Buckley*'s corruption mantle and into a framework that more honestly reflects the issues at play.

III.

I do not know whether the decision of the panel in the case before us is consistent with *Buckley v. Valeo*. I do know that if I were on a panel I would have to decide that question, for I would be bound to follow *Buckley*, however much I think that that decision has diverted the campaign finance reform discussion from the fundamental First Amendment-level values at stake. If I am called upon to vote on a panel, I, of course, follow what I believe the Supreme Court to have held, and I do so whether or not I agree with that holding.

A vote on whether to grant an en banc rehearing, instead, is a "free vote." As the concurring opinion by Judge Sack and Judge Katzmann so elegantly points out, *infra* at 15-18, we may decline to vote to go en banc for any number of reasons, and we need not vote to rehear a

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[6]The Supreme Court itself has seemingly endorsed a broader understanding of the "corruption" rationale than what *Buckley* enunciated — an understanding that could perhaps be read as gesturing toward some of the "equality" considerations that *Buckley* purportedly purged from the debate. Thus, the Court in *Shrink*, rejecting the notion that "corruption" encompassed solely the notion of quid-pro-quo contribution arrangements, announced that the interest encompassed "the *broader threat from politicians too compliant with the wishes of large contributors*" — that is to say, politicians who give *unequal* weight to constituents on the basis of wealth. 528 U.S. at 389 (emphasis added); *see also McConnell*, 540 U.S. at 143, 150-52 (2004).

case en banc simply because we think that an opinion is wrong or is possibly inconsistent with a prior Supreme Court decision. There are many prudential considerations that may, in different circumstances, properly guide us in our consideration of whether an en banc is appropriate. And so, in deciding whether to vote to rehear *this* case en banc, I posed myself the following question: which vote is most likely to bring back into the discussion the issues that I believe to be fundamental with respect to campaign finance legislation?

Ultimately, only the Supreme Court can, by reconsidering *Buckley*, encourage a free and open discussion of what is moving states in this field, and of what ways there might be of best serving the apparently conflicting interests at stake. Not surprisingly, a majority of the Supreme Court itself has indicated an inclination to reopen the question. *See Federal Election Commission v. Colorado Republican Party*, 533 U.S. 431, 465 (2001) (Thomas, *J.*, dissenting) (stating, joined by Justices Kennedy and Scalia, that "*Buckley v. Valeo* . . . should be overruled"); *Shrink*, 528 U.S. at 398-99 (2000) (Stevens, *J.*, concurring) (suggesting disagreement with *Buckley*'s "[r]eliance on the First Amendment framework to justify the invalidation of campaign finance regulations"); *id.* at 405 (Breyer, *J.*, concurring) (stating, joined by Justice Ginsburg, that reconsideration of *Buckley* may be necessary); *id.*, 528 U.S. at 410 (Kennedy, *J.*, dissenting) ("[T]he existing distortion of speech caused by the halfway house we created in *Buckley* ought to be eliminated."). And some have even urged reconsideration on grounds that could potentially recognize the need for equality in gauging intensity of desire in monetary terms. *See, e.g., id.* at 401 (Breyer, *J.*, concurring) ("[B]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process." (citing *Reynolds v. Sims*,

377 U.S. 533, 565 (1964), thereby linking campaign finance jurisprudence to one-person, one-vote jurisprudence)).

I believe such a reconsideration to be essential. And, because I conclude that a reconsideration is more likely to occur if we do *not* rehear this case en banc than if we do, I concur in the denial of such a rehearing.

*****

REENA RAGGI, *Circuit Judge*, dissenting from the denial of rehearing en banc:

I dissent from the court's denial of rehearing en banc without joining in the thoughtful opinions of my dissenting colleagues. I think that this case presents serious questions that warrant further consideration by the whole court, but I am disinclined to express an opinion on the merits without the benefit of further briefing and argument.

No. 04-1530
(consolidated with 04-1528, 04-1697)

In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM SORRELL, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for Petitioners Vermont Republican State Committee, et al.

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December 14, 2005

Questions Presented

1. Whether Vermont's mandatory candidate expenditure limits violate the freedom of political speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's $200-$400 limits per election cycle on campaign contributions to state candidates violate the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution because they are unconstitutionally low.

3. Whether Vermont's presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceeding

The following individuals and entities are parties to the proceeding in the court below:

Petitioners are Plaintiffs Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee –Fund for Independent Political Expenditures, Marcella Landell, and Donald R. Brunelle.

Consolidated Petitioners in 04-1528 are Plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch and Vermont Libertarian Party.

Respondents are Defendants William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand and Deborah Markowitz.

Consolidated Petitioners in 04-1697 and Respondents are Defendant-Intervenors Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson.

Corporate Disclosure Statement

In accord with Supreme Court Rule 29.6, Petitioners state that the Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, and Vermont Right to Life Committee–Fund for Independent Political Expenditures are not corporations, but are associations.

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Opinions Below

The decision of the court of appeals is reported at 382 F.3d 91 (2d Cir. 2004). The opinion of the district court is reported at 118 F. Supp. 2d 459 (D. Vt. 2000).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Plaintiffs' Petition for Rehearing en banc was denied on February 11, 2005, which is reported at 406 F.3d 159 (2d Cir. 2005). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The First and Fourteenth Amendments to the United States Constitution are printed in the *Petition for a Writ of Certiorari* at 1. 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64") is printed in the Appendix to the Petition ("P.A.") at 1a-20a.

Statement of the Case

Petitioners adopt the Statement of the Case in the Brief of Petitioners Neil Randall, et al.

Summary of the Argument

The First Amendment[1] protects the four "indispensable democratic freedoms," *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945), of which political expression is "at the core." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). The "major purpose of that amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Act 64, however, was enacted

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[1]"Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for the redress of grievances." U.S. Const. amend. I.

for the opposite purpose, to force a reduction in overall campaign spending. This purpose is accomplished through the lowest candidate contribution limits in the country, through mandatory candidate expenditure limits, and through treating independent expenditures as related expenditures of candidates subject to these limits. This effort is in flagrant disregard of the First Amendment and is unconstitutional.

Argument

I. Act 64's Entire Scheme Was Enacted with the Specific Intent to Unconstitutionally Force a Reduction in Overall Campaign Spending in Flagrant Disregard of the First Amendment.

A. Vermont enacted both "laughably low" contribution and expenditure limits with the specific intent to force a reduction in overall candidate campaign spending.

Act 64 contains such "laughably low" contribution, P.A. 331a (Walker, C.J., dissenting), and expenditure limits, P.A. at 343a-44a (Cabranes, J. dissenting), "that they cannot but impede meaningful debate of public issues." *Id.* Of course, this was the purpose, as well as the effect, of Act 64's provisions.

Act 64's candidate contribution and expenditure limits were specifically enacted for the impermissible purpose of reducing overall campaign spending. The original version of the bill did not include mandatory spending limits, but did include low contribution limits, Ex. I, E-0001-25, and was lauded by Gov. Howard Dean as a plan which "limits the amount of money candidates can spend in both primary and general elections." Ex. III, E-0903. Similarly, the bill's sponsor, Rep. Karen Kitzmiller, testified in the committee hearings, before the mandatory spending limits were inserted in the bill, that the bill had

two principal goals: (1) "to reduce and control expenditures on election campaigns" and (2) to provide public funding. Ex. VIII, E-2839, E-2894. The legislative counsel also described a principal goal of this bill as "to reduce and control the expenditures on election campaigns," through low contribution limits. Ex. VIII, E-2813. Once the bill had been amended to include mandatory spending limits, the legislative counsel reiterated that "[t]he bill as amended would control campaign expenditures by establishing mandatory campaign expenditure limits applicable to all candidates . . . . The bill would also limit campaign expenditures by limiting the amounts . . . of contributions made to candidates." Ex. VIII, E-2821.

The legislative findings emphasize that "[e]lection campaigns for statewide and state legislative office are becoming too expensive," Finding (1), P.A. 101a, that "expensively long and expensive campaigns" are undesirable, Finding (10), *Id.* at 103a, and that "campaign expenditures must be reduced for incumbents."[2] Finding (15), *Id.* at 104a. In contrast, the terms "corruption" or "improper influence" are conspicuously absent from the legislative findings enacted with Act 64. *Id.* at 101a-04a.

The desire to force a reduction in overall candidate campaign spending was motivated in part by nostalgia for a bygone era when campaigns in Vermont were perceived to be less sophisticated and were thought to

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[2]Act 64 replaced a $1,000 per election candidate contribution limit from individuals and PACs in effect since 1971. Political party contributions to candidates were unlimited. Furthermore, from 1993 to 1998, candidates could voluntarily agree to limit campaign expenditures to amounts that were in place pre-*Buckley*. Former 17 V.S.A. §§ 2841-2842. Participation in this voluntary program went from 85% to 90% in the first year to zero percent of statewide elections in 1998. P.A. 28a. Apparently, these limits did not stem campaign finance spending which the legislature wanted to accomplish with Act 64.

rely on personal contact, not mass media advertizing. Ex. III, E-902; Tr. V-147. With drastically reduced overall campaign spending enforced by Act 64, Vermont argued below that modern, more costly means of communicating with the electorate could be replaced by candidates personally delivering their campaign messages door-to-door (Def.'s Br. 44-46 (2d Cir.)). While some candidates prefer grass roots campaigning, Tr. V-127, 129, 138, 141-43, forego more expensive campaigns due to lack of resources, Tr. II-13, or find it adequate to get themselves elected in non-competitive races, many candidates find it necessary to utilize mass media communications. Tr. IV-163, 172; Ex. VIII, E-3052. Act 64's contribution and expenditure limits, however, attempt to impose one method of campaigning by severely limiting the resources needed for others.

B. Forcing a reduction in candidate campaign spending is an impermissible legislative purpose.

The forced reduction in overall candidate campaign spending is illegitimate under the First Amendment. As this Court stated in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S.1, 57 (1976). Thus, campaign expenditure limits were invalidated in *Buckley*, because they were enacted to combat "wasteful campaign spending." *FEC v. Colorado Republican Fed. Campaign*

Comm., 533 U.S. 431, 457 (2001) (*"Colorado II"*).

Furthermore, legislating for the impermissible purpose of the "suppression of ideas" is unconstitutional, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 n.3 (2000) (*"Shrink"*); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 540 (1987), and was fatal to the limits at issue in *Colorado I*:

> This Court's opinions suggest that Congress wrote the . . . [p]rovision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending.

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618 (1996) (citations omitted) (*"Colorado I"*).

The evidence here demonstrates that the candidate contribution and expenditure limits were drafted for the purpose of reducing overall campaign expenditures, an interest which this Court has explicitly rejected.[3] It should not be surprising that the provisions would have that very effect.

C. Restrictions on candidate speech have a substantial negative effect on our democracy.

Candidate speech, the target of Act 64's contribution and expenditure limits is entitled to the highest protection under the First Amendment. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (applying strict scrutiny to legislation limiting judicial

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[3] "[T]he proponents of Act 64 never doubted its unconstitutionality under *Buckley* and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*." P.A. 194a-95a (Winter, J., dissenting), 201a-02a, 258a-59a; P.A. 340a (Jacobs, J., dissenting); *see also* Ex. VIII, E-2821.

candidate speech). The public must be able to make "informed choices" regarding candidates because those individuals will "shape the course that we follow as a nation," *Buckley*, 424 U.S. at 14-15, and the public is best able to make such choices when they hear *from the candidates themselves* regarding their qualifications and positions on issues.

> [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that *they* be allowed freely to express *themselves* on matters of current public importance. [As a result,] [w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

White, 536 U.S. at 781-82 (citations and internal quotation marks omitted) (emphasis added); *see also id.* at 805-06 (Ginsburg, J., dissenting). So "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of the money spent is from his own funds or is raised through legal contributions. *Buckley*, 424 U.S. at 54. Candidates cannot be required to be bit players in their own elections.

D. This Court should not defer to incumbent legislators that pass laws, such as Act 64, affecting their own electoral fate.

The Second Circuit afforded substantial deference to the "predictive judgments" of the Vermont legislature regarding its "effect . . . on candidate behavior." P.A. 143a

n.17.[4] However, "[p]rotecting speech requires that courts be skeptical and assume the worst – not as a matter of fact, but as a matter of prudence and policy." P.A. 337a (Jacobs, J., dissenting). Strict scrutiny requires this "cold eye." *Id.* at 338a; *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-49 (2001).

This is especially true here where "the dominant but impermissible effect of the Act is to protect incumbents," P.A. 336a (Jacobs, J., dissenting),[5] where the "theory and factual assumptions proffered by the law's supporters [are accepted] at face value even when their actions belie their words," P.A. 207a (Winter, J., dissenting), when the law was expressly adopted for the illegitimate purpose of forcing a reduction in overall campaign spending, and when the State insists that their legislators are so corrupt that they will "sell privileged access," P.A. 101a, for "laughably low" contributions and "so crave reelection that they ignore official duties and personal honor to that end." P.A. 249a (Winter, J. dissenting), 206a.

II. Vermont's Contribution Limits Are Too Low To Be Closely Drawn to Further a Sufficiently Important Interest.

While contribution limits "impinge on the protected

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[4]The Second Circuit cited *McConnell v. FEC*, 540 U.S. 93, 165-66 (2003), for deferring to the predictive judgment of Congress that if state parties were not limited in their use of soft money in federal elections they would be used to circumvent the soft money ban on national parties. This prediction of circumvention has no relevance here. There are no options for candidate speech beyond that permitted by the funds raised under the contribution limits and allowed to be spent under the expenditure limits.

[5]Deference to legislative judgments should be afforded if "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

freedoms of expression and association," *McConnell*, 540 U.S. at 231, they may be upheld if "there is a 'sufficiently important interest,'" and if the limits are "'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25).

A. Vermont's contribution limits are not closely drawn because they are not limited to only large contributions that pose the danger of real or apparent corruption.

The corruption interest arises from "the perception of undue influence of *large* contributors to a candidate," *Shrink*, 528 U.S. at 393 (emphasis added), because of a "threat from politicians too compliant with the wishes of *large* contributors." *Id.* at 389 (emphasis added). Thus, this Court's corruption interest has two elements: (1) that the contribution be large enough to give rise to a legitimate suspicion of corruption, and (2) that there is a bona fide "suspicion that [the] large contributions are corrupt." *Id.* at 389-95.

1. Vermont's contribution limits are not limited to banning only large contributions that pose the danger of real or apparent corruption.

Buckley "reiterated this [large contribution] interest at least seven times," *Carver*, 72 F.3d 633, 638 (8th Cir. 1995) (citing *Buckley*, 424 U.S. at 25-28); *see also Buckley*, 424 U.S. at 45-46, 55, 67, and this Court upheld a $2,150 per election cycle limit in *Shrink* based on evidence of *large* contributions. 528 U.S. at 390-91.

The District Court attempted to meet this "large contribution" requirement by disengaging "large" from "the perception of undue influence." While the court characterized the contribution limits as approximating amounts "considered suspiciously large by the Vermont public," P.A. 59a, none of the seven witnesses the District

Court cited referred to them in this way. In fact, none of these witnesses testified that these contribution amounts would lead to public perception of corruption. The witnesses only referred to the relative size of the amounts, compared to most contributions, as "significant," "good-sized," and "large." A "significant" contribution is not the same as a "suspiciously large" contribution, or one that is large enough to give rise to a "perception of undue influence." Ex. VII, E-2641, 2673; Tr. VII-19; Tr. III-23-26.

2. Vermont has failed to prove that real or apparent corruption is closely related to its low contribution limits.

a. Vermont's conception of "corruption" goes well beyond this Court's.

The "hallmark of corruption" is a "financial *quid pro quo*: dollars for political favors," where "elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). However, there is no evidence of such corruption in this case, and the State's witnesses emphasized that they were "not talking about selling votes . . . . [but] about gaining access," Tr. VII-105-06, such as "through the fundraising system," P.A. 101a, or because "officials are more likely to return donors' phone calls." *Id.* at 140a. This evidence, however, was related to contributions of a thousand dollars or more, far above Act 64's new limits. Tr. VII-50 ($1,000); Tr. IX-167-69 ($1,000 to $2,000).[6] Indeed, the only finding by the Vermont

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[6]In fact, Plaintiffs' evidence demonstrated that, of those members of the public that thought that persons making large contribution were "trying to buy special favors," 53% picked $20,000 or more, 17% picked a contribution from $1,000 to $5,000, and only 2% said "any amount." Ex. VIII, E-2742.

legislature that even remotely related to "corruption" was that Vermont politicians would "give access to contributors who make large contributions in preference to those who make small or no contributions," Finding (2), P.A. 102a, and the court below believed that this was sufficient. *Id.* at 94a.

It is true that this Court has found that the interest in corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U. S. at 150 (citation and internal quotation marks omitted). It was, however, "the manner in which parties *sold* access to federal candidates and officeholders," in *McConnell*, "that has given rise to the appearance of undue influence." *Id.* at 153. In *McConnell*, a systematic scheme of the national party committee "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150. But here there is no evidence of pre-access demands for contributions conditioned on granting access, only evidence post-contribution of "officials . . . more likely to return donors' phone calls." P.A. 140a.

This minimal evidence was countered by considerable evidence that even gaining access to legislators by large campaign contributions is not reasonably perceived in Vermont politics. Several witnesses with extensive experience in Vermont government testified that they were not aware of any Vermont politician ever providing preferential access for campaign contributions. For example, Steve Howard testified that in his six years of service in the Vermont House of Representatives and as chairman of the State Democratic Committee he was never aware of any situations in which contributions have purchased access to Vermont legislators. Tr. IV-180.

Moreover, there is considerable evidence in this record

that politicians in Vermont are readily accessible to all constituents. "Legislators [in Vermont] are accessible [] even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81. Legislators in Vermont will typically see anyone that wants to see them. Tr. VII-28. The record shows that Vermont officials are readily and easily accessible to *all* constituents.

b. Given the implausibility that $200-$400 contributions pose a danger of corruption, convincing evidence of corruption is necessary.

Although contribution limits can be upheld based upon their value in preventing corruption, this justification is not automatic. Even though the interest is "important in the abstract," this does not necessarily mean that the contribution limits "will in fact advance those interests." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part) ("[A]pplication of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue."). Thus, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. "*Buckley* demonstrates that the dangers of *large*, corrupt contributions and the suspicion that *large* contributions are corrupt are neither novel nor implausible." *Id.* (emphasis added). The limit upheld in *Shrink*, however, was $2,150 per election cycle, which is much larger than Vermont's $200 to $400 per election cycle limits. A

stronger evidentiary showing of the government's interest is required here, because Vermont's limits are so low as to render the anti-corruption interest implausible.[7]

Furthermore, these new low contribution limits replaced Vermont's $2,000 per cycle contribution limit. There is no evidence that the prior limit was insufficient to accomplish its permissible purpose. This is fatal to the constitutionality of the new limits. *See, e.g. Carver*, 72 F.2d at 643 (striking down new low contribution limits due to a lack of "any evidence of a harm or disease that needed to be addressed" between the old and new limits).

3. There is insufficient evidence of corruption in this case.

In upholding the limits in *Shrink*, this Court relied upon evidence that contributions in Missouri actually appeared to corrupt politicians.[8] In contrast to the

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[7] For example, this Court has held that a zero contribution limit on minors was unconstitutional, because "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny." *McConnell*, 540 U.S. at 232.

[8] The record evidence in *Shrink*, and the related case of *Carver*, included serious reports of alleged corruption. One reported incident was the decision of the state treasurer to use a bank for state business after that bank contributed $20,000 to the treasurer's campaign. *Shrink*, 528 U.S. at 393. Another article reported a state auditor candidate's receipt of a $40,000 contribution from a brewery and a $20,000 contribution from a bank. *Id.* The Eighth Circuit in *Carver* cited a $420,000 contribution to Missouri candidates from a political action committee linked to an investment bank. *Id.* at 393-94. In addition, there were reports of three scandals, including one in which a state legislator was accused of sponsoring legislation in exchange for kickbacks and another report of Missouri's former attorney general pleading guilty to conspiracy charges for misusing state property after being indicted for using a workers' compensation fund to profit campaign contributors. *Id.* at 394. In spite of these seemingly serious problems in Missouri, this Court cautioned that "there might, of course, be need for a more extensive evidentiary

evidence in *Shrink*, what is most significant about the State's evidence here is that it is "largely sparse, anecdotal, and conclusory," P.A. 266a (Winter, J., dissenting), contains "gross hyperbole . . . with precisely the same scripted sound-bites that are used in every talk-show discussion of the issues," *Id.* at 268a, and presents an absurdly contradictory "portrait of Vermont politics." *Id.* at 266a-67a. Despite a ten-day trial and testimony from the chief drafters and promoters of this legislation, veteran legislators, and campaign managers, the State failed to uncover a single incident of real or apparent corruption. Defense witnesses conceded that they could not point to any such incident in their own extensive experience in politics. Peter Smith, a former Vermont officeholder, testified that he was not aware of any instance in Vermont in which there was trading of votes in exchange for contributions. Tr. VIII-79. Karen Kitzmiller, a state representative, complained that "two particular groups, the tobacco industry and the pharmaceutical industry . . . freely give contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). *See also* Tr. V-115; Ex. IV, E-1362-64.

The District Court's decision was also based upon evidence of dubious relevance and little magnitude. Most of it pertained to a supposed erosion of public confidence. P.A. 56a. However, such a showing of a general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates." *NCPAC*, 470 U.S. at 499; Tr. VIII-134-38. The State has failed to bring forth convincing evidence of real or

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documentation if petitioners had made *any* showing of their own to cast doubt on the apparent implications of . . . the record." *Id.* (emphasis added).

apparent corruption, especially in light of the extremely low level of the limits and in light of the considerable evidence weighing against the legitimacy of the interest.

III. Because Vermont's Contribution Limits Are So Low That They Prevent Candidates from Mounting Effective Campaigns, They Are Unconstitutional.

A. Contribution limits that have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy are unconstitutional.

"Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'prevent[] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21); *Shrink*, 528 U.S. at 395-96 (same). Thus, "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981), which would make the limits a "difference[] in kind," not just a "[d]istinction[] in degree." *Buckley*, 424 U.S. at 30. Such a "system of suppressed political advocacy . . . would be unconstitutional under *Buckley*," *Shrink*, 528 U.S. at 396.[9]

B. Vermont's contribution limits have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy.

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[9]For analogous situations, *compare Rosario v. Rockefeller*, 410 U.S. 752 (1973) *with Kusper v. Pontikes*, 414 U.S. 51 (1973); *also compare Hill v. Colorado*, 530 U.S. 703 (2000) *with Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

The Second Circuit failed to undertake a careful review of the consequences of the contribution limits and instead deferred to the flawed findings of the District Court, which found that the limits did not have a severe impact on political dialogue, primarily because: 1) over the three election cycles prior to trial, less than 10% of individual contributions exceeded the limits, and 2) the limits were high enough to permit effective campaigning in a mayoral election conducted under the limits. P.A. 170a. These findings do not justify contribution limits as extraordinarily low as Vermont's.

1. The evidence demonstrates that Vermont's contribution limits have a severe impact on political dialogue.

First, the District Court found that "[e]xpert testimony revealed that over the last three election cycles the percentage of all candidates' contributions received over the contribution limits was less than 10%." P.A. 57a. However, the District Court used the wrong analysis. Since this Court's concern is whether the limits could have a "severe impact on political dialogue," *Buckley*, 424 U.S. at 21, the focus must not be on how many individual contributions were over the limit, but rather the total amount of campaign *funds* that candidates would lose.

The evidence in *Shrink* failed to show any impact on the total amount of funds available to campaigns beyond the dubious and singular example of one candidate, who could identify only one contributor who would have given him more than the limit. This evidence failed, since "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Shrink*, 528 U.S. at 396.

In contrast to *Shrink*, the State's expert confirmed that Vermont campaigns would lose significant funds, over

28% in 1998 for all state senate campaigns and over 22% in all state house campaigns.[10] Ex. III, E-976-78. The impact on statewide candidates since 1994 showed several candidates losing more than 50% of their funding, with impacts of 30% or more being quite common. Ex. III, E-970-74.

Such statistics dwarf the 5.1% of funds affected by the contribution limits in *Buckley*, which provided the basis for the Court's finding that "[t]here is no indication . . . that the contribution limitations . . . would have any dramatic[ally] adverse effect on the funding of campaigns and political associations." 424 U.S. at 21.

The State's expert analyzed the effect on all campaigns when the focus should be on competitive elections. P.A. 236a-40a (Winter, J., dissenting); Tr. II-73, IV-17, VIII-150-51, X-154. There are many races where campaigns are irrelevant to the outcome, such as where candidates run unopposed, against only token opposition, or in a district that overwhelmingly favors one party. Tr. III-37. Further, minor party candidates rarely run to win but only to show the flag. Tr. II-22, 39. Because of these factors, over 1/3 of victorious house candidates in 1998 spent less than $500.00 in their campaigns, Ex. III, E-0945, and many more won with little candidate spending.

A better model for evaluating the effect of campaign finance limits is to examine the fraction of races that are truly competitive. Tr. II-73. In competitive races, an effective campaign can contribute to the outcome, and often determine which party controls legislative assemblies. Tr. VIII-139-40; Ex. VIII, E-2748. Thus, candidates

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[10]These percentages are actually significant understatements of funds lost due to the expert's assumption that all non-filing candidates each raised $500, and that none of those candidates received contributions over the applicable $200 or $300 limit. Ex. III, E-946-47. Neither assumption is correct.

are motivated to reach as many voters as possible through a variety of methods, including door-to-door distribution of literature, campaign events, direct mail, and advertising in newspapers, on radio and television, and through bill boards and yard signs. Ex. VIII, E-2760, E-2766, E-2772-77. E-2789, E-3052, E-3056-60. Since competitive races are where effective campaigns are most often conducted and can have an impact, the relevant measure of contribution limits is their effect on competitive races. Tr. X-154, IV-17.

The Plaintiffs' expert found that 20% of both senate and house campaigns in 1998 would have experienced a loss of over 30% of their contribution funds. Ex. VII, E-2351. Furthermore, in analyzing the most competitive elections, those targeted by the Vermont Republican Party, the Plaintiff's expert found that in 15 of the 17 1998 house races, the Republican candidates would have lost between $550 and $3,761 in raw dollars and between 8.7% and 54.8% in total funds as a result of the contribution limit. Ex. VII, E-2360-75. Similarly, the 14 targeted senate candidates would have lost from $3,150 to $6,900 in raw dollars and 13% to 43.7% of their total funds. Ex. VII, E-2354-59. When the "single source" rule is applied to Republican Party contributions, the candidates would have lost more funds. Ex. VII, E-2602. These candidates would have been forced to forego substantial communications as a result. Tr. II-81-95.

2. The evidence establishes that the contribution limits prevent candidates from amassing the resources necessary for effective campaigns.

Second, the District Court found that because the Burlington mayoral election, conducted after imposition of the contribution limits, "involved effective campaigns despite the contribution limitations," and because "the mayoral candidates raised funds comparable to the

amounts spent in state senate races in the past," P.A. 171a, the limits were high enough to permit effective campaigning.

The evidence demonstrates, however, that the $200 contribution limit in the mayoral race prevented challenger Kurt Wright from mounting an effective campaign. He "worked very hard" and "did well to raise" the $19,158 that he ultimately received, Ex. VIII, E-3053-54 (Wright deposition), Ex. VIII, E-2789, but this was $8,000-$10,000 less than it would have been. Ex. VIII, E-3052-54. This loss of funds forced the cancellation of a crucial direct mail effort and reduced his communication by other methods such as radio, television, and through volunteers coordinated by paid staff. Ex. VIII, E-3052.

The District Court also relied on a superficial description of the overall spending in the mayor's race compared with that of Chittenden County Senate races. The District Court compared the two competitive mayoral candidates with the *average* spending in six senate races, which included many candidates whose election was either a foregone conclusion or an impossibility. P.A. 58a-59a. In fact, in the 1996 and 1998 Chittenden Senate races, there were five challengers – including Wright himself – who spent more than Wright did in his mayoral race. Ex. IV, E-1305-06. In summary, the District Court's findings not withstanding, the evidence demonstrates that the contribution limits have a severe impact on political dialogue.

To determine whether the limits prevented candidates from mounting effective campaigns, the Second Circuit erroneously looked to whether the limits are "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." P.A. 153a, 157a. This language, borrowed from *Shrink*, 528 U.S. at 397, is not the constitutional standard; instead, the standard looks to a candi-

date's "power to mount a campaign with all the dollars likely to be forthcoming." *Id.* When low contribution limits act as expenditure limits, candidates still must have sufficient funds to mount effective campaigns. Read otherwise, this would represent a complete abandonment of the First Amendment mandate that citizens "retain control over the quantity and range of debate on public issues in a political campaign," and that the government may not limit certain spending because it deems it "wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57.

The amount of money needed to mount an effective campaign[11] varies widely.[12] Some candidates are well known; others have a substantial advantage due to their party affiliation. Some districts comprise a single town with a single media market while others have several towns or large rural areas with multiple media markets. Still others are located in metropolitan areas where media ads are especially expensive because they cover more than the district. Tr. II-74-95.

Another key factor is the well established principle of diminishing marginal returns. After an initial surge of

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[11]Generally, a candidate is able to mount an effective campaign when she is able to effectively communicate to at least 75-80% of potential voters the candidate's name, something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. Tr. I-95-97; Tr. IV-80; Tr. II-71. This requires communicating a minimum of 4 to 5 messages at least 4 to 5 times to each potential voter, Tr. I-98-100; Tr. II-72. The candidate must also have sufficient funds to respond to an opponent. Tr. II-126. Many candidates do not run effective campaigns. Tr. I-95-96.

[12]For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house and $30,000 to $50,000 in the senate, Tr. IV-169, 171; an effective statewide gubernatorial race costs between $600,000 and $800,000. Tr. IV-81; Tr. I-39-40; Tr. IV-27-28.

very effective spending, each successive communication dollar is likely to reach and motivate fewer voters. Conversely, each successive voter will cost more to reach than the one before. Tr. III-163-64. Reaching such additional voters is critical in the most competitive races. For this reason, mounting an effective campaign in a competitive race costs far more than less competitive ones.[13]

The record is replete with evidence that the contribution limits are too low to permit effective campaigning. George McNeill, a political consultant for hundreds of Vermont races, testified that many 1998 Vermont state senate and house candidates would not have been able to run effective campaigns under the limits. Tr. II-73-101. Ninety percent of house races targeted by the Republican Party in 1998 and seventy-nine percent of targeted 1998 senate races would have been unable to run effective campaigns. Tr. II-74-92, 99-102.[14] The money lost could

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[13]In addition, because of the low contribution limits, candidates will face increased competition from independent expenditures, which could drown out or at least dilute the candidate's own message. In fact, the "tight contribution limits" have caused an "unprecedented amount" of independent expenditures in the 2000 election. P.A. 241a (Winter, J. dissenting).

[14]For instance, Gerald Morrissey would have lost one-quarter of his contributions revenue under the contribution limits, and could not have effectively campaigned for state senate against an "entrenched senator." Tr. II-76. Neither could Dennis Delaney, because Chittenden County is Vermont's largest county with much higher expenses. Tr. II-80-81. Ruth Harvie could not have effectively campaigned because advertising for mass media in her state senate district is expensive since there are a lot of "small, individual newspapers." Tr. II-84-85. Joseph Tully, a "relative newcomer," would have been unable to "get the name recognition and the issue recognition that he was able to get" before the limits. Tr. II-87-88. Patricia Welch, who had "been out of the political scene for five to six years," would not have acquired the necessary name recognition. Tr. II-89. Harvey Smith could not have effectively campaigned, because, in his

not have been regained by additional fundraising. Tr. II-74-92, 99-102.[15]

William Meub, who had run for governor, testified that the contribution limit would have prohibited him from amassing the resources he needed to mount an effective campaign and would have drained his time, making it even more difficult to campaign. "What you have done [by imposing the $400 limit] is you have required an increased amount of time at fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning . . . ." Tr. IV-36.

The extensive record in this case firmly establishes that Vermont's exceedingly low contribution limits create a "system of suppressed political advocacy," just as the legislature intended. Because candidates cannot mount effective campaigns under the limits, Vermont's contribution limits are unconstitutional.

IV. Vermont's Contribution Limits Are Unconstitutionally Low Because They Insulate Legislators from Challenge.

Contribution limits can be so low that they "significantly increase[] the . . . advantages of incumbency and thereby insulate[] legislators from effective electoral

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district, he would have to advertise in more than one newspaper and on two or three radio stations. Tr. II-91. If $2000 had been removed from David Brown's campaign funds, he would have had to reduce advertising, "whether in the newspapers, TV or lawn signs . . . [or] walking banners," and "you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." Tr. II-92.

[15]Act 64's contribution limits also have a chilling effect on individuals deciding whether to run for office. McNeill testified that prospective candidates, after having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." Tr. II-65.

challenge." *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). This concern acknowledges that challengers face the harshest impact of contribution limits.

"[A]n incumbent usually begins the race with significant advantages." *Buckley*, 424 U.S. at 31 n.33. Most incumbents begin their campaigns with strong name recognition and widespread public knowledge of their qualifications and positions. Ex. IV, E-1395-99. Challengers spend more to get their message out, Tr. IV-172-73; Ex. VII, E-2703-05, because they are usually relative unknowns. Tr. II-184. Challengers also suffer because they generally have less developed contributor lists and contact networks than incumbents, so they tend to have more difficulty raising funds than incumbents, Ex. VIII, E-3076; Tr. I-94-95, and must rely upon a smaller group of larger contributors, especially for the "seed money" they need to get their campaigns started. Tr. IV-40.

Justice Breyer emphasized, in *Shrink*, that, "[t]he statutory limit here, $1,075 [per election], is low enough to raise such a question." *Shrink*, 528 U.S. at 404 (Breyer, J. concurring). Thus, Missouri's contribution limits, even though upheld, were constitutionally suspect, even though they allowed per-cycle contributions of more than five times that allowed by Vermont's highest limit.[16] If limiting Missouri candidates to $2,150 per election cycle raises disturbing questions, Vermont's limits of $200-$400 per cycle must be considered unconstitutional.

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[16]Act 64's choice of a two-year cycle combines primary and general elections under the limits and "does not reduce the influence or access to officeholders of special interests, reduce time pressures on candidates, or increase citizen or voter confidence in government." P.A. 256a (Winter, J. dissenting). The two-year time period, however, "will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle." *Id.* at 248a.

The data compiled by both the State's and Plaintiffs' experts show that Vermont's limits will impose a greater burden upon most challengers. In Vermont, challengers routinely have outspent incumbents because they are more dependent upon spending for developing their reputations with the voters. Ex. VII, E-2352; Ex. III, E-987-92. Moreover, challengers rely on larger contributions than have incumbents, so that challengers in both the house and senate in 1998 would have lost a larger share of their funds than incumbents.

According to the State's expert Anthony Gierzynski, these limits would have banned 36% of the funds raised in 1998 senate races by all non-incumbents compared with 20.2% of the funds raised by all incumbents. Ex. III, E-0976. Similarly, in 1998 house races, the limits would have prohibited 24.6% of all non-incumbent funds compared with 19.7% of all incumbent funds. Ex. III, E-0978. Seventy-five house challengers (out of 150 seats) would have lost $44,680, while the 67 incumbents would have lost only $15,493. Ex. VII, E-2360. This understates the full extent of the problem because the data examined all candidates, not just the candidates in competitive races. Furthermore, this disparate impact on challengers is compounded because challenger spending is more effective than incumbent spending on a dollar for dollar basis. Tr. X-81; *see also* Tr. III-163.

Non-incumbent candidates, therefore, "are at an incredible disadvantage under the . . . statute[]." Tr. IV-172.[17] Thus, Act 64 is an effective means to protect incumbents.

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[17]This is especially true for nontraditional candidates, such as "a woman, an openly gay candidate, an African American candidate." Tr. IV-174. As an openly gay candidate himself, Steve Howard had the "added burden" of proving himself to voters. Tr. IV-175.

V. The Limits on Contributions to Candidates from Political Parties Are Too Low to Pass Heightened Scrutiny.

The District Court correctly recognized that even though limits on contributions from parties to candidates are permissible in order to "deter avoidance of the individual contribution limits," Vermont's contribution limits for political parties to candidates are too low. P.A. 72a-76a. The court explained that limits on party contributions "cannot be so radical in effect as to render political association between parties and candidates ineffective." *Id.* at 75a. The court found that the low limits "would reduce the voice of political parties to an undesirable, and constitutionally impermissible whisper." *Id.* at 76a. Furthermore, parties must "continue to function as they have in the past" in order to preserve the "stability and consistency of our competitive electoral process." *Id.* The Second Circuit reversed this decision, claiming no party evidence of lack of corruption, and rejecting the unique role of parties, and erroneously based its holding on this Court's decision in *Colorado II*. *Id.* at 176a-78a.

A. There is no evidence that political parties in Vermont act as conduits for contributions from donors to candidates.

In *Colorado II*, this Court considered a federal law imposing robust limits on a party's coordinated spending for a candidate. 533 U.S. 431; 2 U.S.C. § 441a(d)(3).[18] This

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[18] 2 U.S.C. § 441a(d)(3) allowed parties to spend in coordination with a Congressional candidate the greater of $20,000 (adjusted for inflation, § 441a(c)) or two cents multiplied by the voting age population. In 2000, the Senate limits ranged from $67,560 to $1,636,438; the House limits ranged from $33,780 to $67,560. *Colorado II*, 533 U.S. at 439 n.3. Vermont's limits of $200-$400 are much lower.

Court applied heightened scrutiny, inquiring whether the restriction was "closely drawn" to further a "sufficiently important government interest in combating political corruption." *Colorado II*, 533 U.S. at 456 (citations and quotation marks omitted).

This Court held that the *evidence demonstrated* "beyond serious doubt" that contribution limits to candidates would be eroded if coordinated spending were unlimited, *id.* at 457, since there was "substantial evidence" that candidates, contributors, and parties had tested the limits of the law. *Id.* Because political parties were found to be conduits for some contributors who sought to support a specific candidate through contributions to a party, *id.* at 451-52,[19] unlimited coordinated spending by a party could raise the risk of real or apparent corruption though circumvention of candidate contribution limits. *Id.* at 456.

In this case, however, the courts below found no evidence that candidate contribution limits are circumvented by donors that contribute to parties in order to benefit a specific candidate. There is no evidence of a tally system or of special clubs set up for large contributors.[20] But most importantly, the Vermont Republican

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[19]This Court based this conclusion on record evidence that the Democrat Party utilized a method known as "tallying," a system that "helps to connect donors to candidates through the accommodation of a party." *Colorado II*, 533 U.S. at 459. A former Democrat senator explained that "[d]onors would be told the money they contributed could be credited to any Senate candidate." *Id.* This Court also found that the Democratic Senatorial Campaign Committee had set up exclusive clubs for large contributors, who were invited to meet with Senators and candidates. *Id.* at 461 n.25.

[20]In addition, a political party in *Colorado II* could "spend money in support of a candidate without legal limit so long as it spends independently. A party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and

Party here does not seek to make unlimited contributions to its candidates, but only reasonable ones and the limits here are set too low. Because of the many differences between the two cases, the Second Circuit's reliance on *Colorado II* was misplaced.

B. Because of the differences between political parties and other contributors, political parties are entitled to robust contribution limits to their candidates.

The notion that a political party would seek to corrupt its own candidates is contrary to the consensus among political scientists that political parties and their candidates have uniquely shared interests, because (1) a party recruits and nominates its candidates and is his or her first and natural source of support and guidance, (2) a candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books, (3) a successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns, (4) a party's public image largely is defined by what candidates say and do, (5) a party's candidate is held accountable by voters for what his or her party says and does, and (6) a party succeeds or fails depending on whether its candidates succeed or fail. Individual and special interest contributors do not share comparable ties with a candidate.

Further, political parties have a different primary goal to achieve than other contributors – political parties contribute to their candidates in order to gain a majority, while others contribute to gain support for their public policy agenda. Left to their own devices, political parties

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any viewpoint." 533 U.S. at 455. In contrast, parties in Vermont cannot spend independently, without legal limit, due to the broad related expenditure provision.

tend to target their limited resources on challengers in competitive races. Non-ideological political action committees representing economic interests, however, tend to contribute to incumbents. Tr. X-149-51. The difference in contribution strategies is explained by their different motivation. Political parties pursue an "electoral" strategy, to gain or keep a governing majority, which is best achieved by supporting challengers (or vulnerable incumbents) in competitive races. Tr. X-149-50. Economic PACs, however, recognize that incumbency is the best predictor of election results, so contributing to incumbents helps maintain relationships with those most likely to affect the PAC's interests (and to avoid offending them by giving to challengers). Tr. X-149-50. Political scientists refer to this as a "legislative" strategy. Tr. X-149-50.

In fact, "targeting" by political parties is good for democracy, promotes more competition, helps challengers overcome the natural advantages of incumbency, equalizes competition, decreases the influence of the wealthy, and gives the voters more choice. Tr. VIII-139-41. Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns." Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing,* 15 Am. Rev. Pol. 171, 171-89 (1994). Both the Plaintiffs' and the State's expert witnesses agreed that an expanded role for parties in the financing of candidate campaigns would be healthy for the electoral process and would actually remedy many of the perceived problems raised by proponents of Act 64. Tr. VIII-133-34, 143-44; Tr. X-150-52.

Vermont's new contribution limits, however, would severely weaken political parties. Tr. VIII-103. This "decline of party strength inevitably will enhance the influence of special interest groups whose only concern

all too often is how a political candidate votes on a single issue." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting). Since there is no record evidence that contributors to political parties in Vermont are seeking to corrupt their candidates, the low contribution limits from political parties to candidates are not justified.

C. Further, the low party contribution limits to candidates would have a severe impact on political dialogue, preventing candidates from mounting effective campaigns, and, thus, do not survive heightened scrutiny.

Act 64's limits on contributions from parties to candidates will severely weaken the ability of candidates to raise the funds necessary for effective advocacy. The evidence establishes that many candidates will lose a large portion of their funds, which will prevent candidates from engaging in effective advocacy.

Plaintiffs' expert Clark Bensen analyzed several 1998 House races targeted by the Vermont Republican Party. Those targeted challengers would have been deprived of an average of $1,500 each in Republican Party contributions under the new limits or 30% of the funds they raised. Ex. VII, E-2602. Each of these candidates were challengers who won their races against incumbents. State expert Gierzynski also compiled a detailed report of the Republican Party's contributions in 1998 and concluded that the Republican Party had concentrated its resources on a few races and had given more than the new limits would allow. Tr. X-153-54.[21] The new contribu-

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[21]In 1998, the Republican Party contributed to 38 out of 126 candidates for the House. Ex. III, E-1012. Thirty of those contributions exceeded the $200 limit. Ex. III, E-1013.

tion limits, combined with the single source rule,[22] dramatically impact the Republican Party's ability to support its own candidates and will adversely impact candidates' campaigns.

In addition to losing direct monetary contributions, candidates will lose in-kind contributions of donor and voter lists, which are subject to the candidate contribution limits. Tr. I-167. This would have a particularly adverse impact, which concerned the District Court: "[P]olitical parties have traditionally done this . . . if you literally apply Act 64 to these lists . . . there's no way that a political party could ever share names of supporters with their candidates." Tr. IV-142-43. These lists are important to candidates so that they can communicate with voters and solicit contributions.

Parties also engage in other activities that are important to effective campaigning by candidates. During the 1998 election cycle, the Republican Party spent $200,000 to $300,000 on get-out-the-vote and absentee ballot programs which were often coordinated with particular candidates. Tr. I-194-95. Because of Act 64's "related expenditure" provision, these activities are treated as contributions and would have to be done by the candidates themselves or by the party completely independently, which would be less effective. Tr. I-168.

Candidates will lose substantial campaign funds under the limits on contributions from parties, restricting their ability to amass the necessary resources for effective advocacy. Therefore, the party contribution limits to candidates are too low to survive heightened scrutiny.

D. Furthermore, Vermont's low contribution limits from parties to their candidates undermine

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[22]All units of political parties are aggregated as a "single source" for purposes of the contribution limits.

the parties' ability to engage in effective advocacy, the purpose for such political association, which means that they are unconstitutional.

Because of the majoritarian goals of parties, "[c]ontributing money to candidates is a major means by which political parties define their existence." P.A. 47a. The purpose of parties is thus frustrated by the low contribution limits, which unconstitutionally preclude them "from effectively amplifying the voice of their adherents," *Shrink*, 528 U.S. at 387 (citing *Buckley*, 424 US. at 22), thereby thwarting the purpose of the association of "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22; *see also FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association").

1. Political parties are political associations formed to engage in effective advocacy.

Political parties play a constitutionally significant role in American political life:

> It is this ability and propensity of our citizenry to unite and pursue desired goals that form the foundation of American political thought. Indeed, the very existence of this nation stands as a testament to the efficacy of political organization.
>
> The bundle of freedoms bestowed by the first amendment, often perceived as safeguarding the individual from the will of the group, also serves to protect the group against the tyranny of the state. Having just emerged from an impassioned struggle for independence, the framers appreciated that effective political change could best be achieved through collective

> activities, and further recognized that the right to associate for political purposes was a natural concomitant of the right to espouse political views.

Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 267 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986); *see also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989). Moreover, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). A political party's association with its own candidates enjoys heightened protection because a party's nominee "becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* at 575.

2. Act 64's limits on political parties prevent them from engaging in effective political advocacy.

Plaintiffs' expert Professor Gerald Pomper is a founding member of the Committee for Party Renewal, which in 1984 adopted a manifesto entitled "Principles of Strong Party Organization," Ex. VII, E-2471-78, which can be used as a diagnostic tool to evaluate the effects of campaign finance restrictions on the effectiveness of political parties. Tr. VIII-104. The *Principles* are:

- Political parties should govern themselves.
- Political party organizations should be open and broadly based at the local level.
- Political parties should advance a public agenda.
- Political parties should be effective campaign organizations.

- Political parties should be a major financier of candidate campaigns.

Professor Pomper performed this evaluation and found that Act 64, "[i]n all but explicit language . . . essentially abolish[es] political parties from Vermont . . . and more fundamentally, the statutes subvert basic principles of democracy." Ex. VII, E-2463.

Under the Principle "Political parties should be a major financier of candidate campaigns," Pomper testified that parties "do a kind of triage." Tr. VIII-139. Parties give little to candidates who are sure to win or lose; instead, they "concentrate on the ones which are closely competitive." Tr. VIII-140. But the limits on contributions to candidates by parties, coupled with treating much traditional party voter registration and get-out-the-vote activity as in-kind contributions, "severely weakens the political parties in Vermont . . . [because] it severs any relationship . . . between the political parties and the candidates, and worsens the electoral process in the state." Tr. VIII-103. In sum, Pomper concluded that Act 64 violated each of the above Principles to the detriment of the political process in Vermont. Tr. VIII-104, 106-07, 119-20, 132-33, 140-41.

Furthermore, low contribution limits frustrate the electoral goals of political parties by making it more difficult for them to help challengers. State expert Gierzynski testified that when political parties are unfettered by low contribution limits they tend to focus their resources by giving large amounts to challengers in competitive races. *See* Ex. VIII, E-2748. Because of this, campaign finance laws ought to have higher contribution limits from political parties than from other contributors. Tr. X-151-52; Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 Am. Rev. Pol. 171, 171-89 (1994); Anthony Gierzynski,

Money Rules: Financing Elections in America 121-22 (Westview Press 2000). The limits here do the opposite by preventing them from engaging in effective advocacy for their targeted candidates, ultimately frustrating the parties' electoral goals, the purpose of their association. As a result, Vermont's low contribution limits from parties to their candidates fail heightened scrutiny.

VI. Vermont's Mandatory Candidate Expenditure Limits Violate the First Amendment.

Act 64 imposes mandatory spending limits on candidates: $300,000 for governor, $100,000 for lieutenant governor, $45,000 for other statewide offices, $4,000 for state senator (plus an additional $2,500 for each additional seat in the same senate district), and $2,000 for a single member and $3,000 for a two member house district.[23] 17 V.S.A. § 2805a(a). However, no principle is more settled than that government-imposed expenditure limits on political speech, particularly by candidates, are repugnant to the First Amendment. *Buckley*, 424 U.S. at 58; *NCPAC*, 470 U.S. at 493-94; *Colorado I*, 518 U.S. at 614-16.

> A restriction in the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, 424 U.S. at 19.

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[23]Additionally, statewide incumbents are limited to 85 percent of the mandatory spending limits and incumbent senate and house members to 90 percent. 17 V.S.A. § 2805a(c). Amendments to Act 64, effective July 1, 2005, provide that the expenditure limits shall be adjusted for inflation. 17 V.S.A. § 2805a(e).

Under Vermont's campaign scheme, once candidates have spent their expenditure allowance, they are muzzled. At that point, they are unable to effectively respond to criticism from the press and groups that spend independently, who can do so without limit. Furthermore, candidates are even prohibited from driving their family car to a town square to speak once the limit has been met. Thus, candidates have no "alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989). Vermont has relegated candidates to bit players in their own elections.

A. There are no compelling interests sufficient to limit candidate expenditures.

"Regulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Buckley* 424 U.S. at 44-45; *NCPAC*, 470 U.S. at 496. The Second Circuit held that an anti-corruption interest, when added to the interest in protecting the time of elected officials, was sufficient to uphold mandatory candidate expenditure limits. P.A. 145a. The majority remanded the case to the District Court to determine whether the limits were narrowly tailored to further those interests. *Id.* at 96a-97a. Judge Winter disagreed that the interests were compelling, explaining that each of the interests "has already been considered and rejected by the Supreme Court." P.A. 258a (Winter, J., dissenting) (citing *Buckley*, 424 U.S. at 44-45).[24]

1. Preventing the reality or appearance of corruption is not a compelling interest.

The anti-corruption rationale employed by the courts

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[24]Further, combining the two interests does nothing to make either compelling. "[A] synergy of nothing with nothing" is still nothing. P.A. 337a (Jacobs, J., dissenting).

below, however, has consistently been rejected as a justification for spending limits, *Buckley*, 424 U.S. at 45; *Colorado I*, 518 U.S at 618; *NCPAC*, 470 U.S. at 489; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978), because there is no relationship between corruption and expenditures. "There is nothing invidious, improper, or unhealthy in permitting . . . funds to be spent to carry the candidate's message to the electorate." *Buckley*, 424 U.S. at 56.

The Second Circuit rationalized applying the anti-corruption interest by asserting that "*Buckley* was 'decided on a slender factual record,'" P.A. 117a, and that the factual record presented by the State could be sufficient to distinguish *Buckley*. *Id.* at 135a. However, the record in *Buckley* was far from "slender:" *Buckley*

> contained *over 700 pages* of statistical and testimonial data and findings of fact . . . includ[ing] data from opinion polls on public perceptions of politicians, political participation, expenditure limits, and cynicism about government, detailed catalogs of specific contributions by labor unions, PACs, and business organizations to individual candidates . . . and evidence that elected officials give preferential access to large contributors.

P.A. 259a-60a n.23 (Winter, J., dissenting) (citations omitted) (emphasis added). This Court had a full evidentiary record before it when it decided that the anti-corruption interest is not compelling and cannot support expenditure limits.

This is true even if the corruption interest is defined only as gaining "privileged access," which the court below thought was adequate. P.A. 101a. While the circuit court in *Buckley* noted that "[l]arge contributions are intended to, and do, gain access to the elected official," *Buckley v.*

Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), this Court still held that the concern about "improper influence," 424 U.S. at 27, 45-46, a much stronger term, was insufficiently compelling to justify expenditure limits. *Id.* at 55. Having found something akin to "bribes" as insufficient, this Court "hardly had to go on to say that access or the appearance of access – returning or taking a phone call from a donor – was also not compelling." P.A. 259a (Winter, J., dissenting).

2. *Buckley* rejected the interest in protecting incumbents' time from the burden of fundraising.

The Second Circuit held that Vermont's interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties," P.A. 135a, such as "independently studying legislative proposals or meeting with constituents," *Id.* at 142a, is compelling, when considered in tandem with the anti-corruption interest. *Id.* at 144a (quotation marks omitted).

The Second Circuit, seeking to minimize *Buckley*'s dismissal of this interest, maintained that this Court "alluded to this time-protection interest only in passing."*Id.* at 137a (citing *Buckley*, 424 U.S. at 91, 96). However, the interest in protecting candidates' time by alleviating the burden of fundraising was considered and rejected in *Buckley*. The time-protection rationale

> was relied upon by the Court of Appeals in *Buckley* in upholding the statute, was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

P.A. 263a-65a (Winter, J., dissenting) (footnotes omitted). The time-protection interest "was, understandably, given only passing attention by the Court because it is not compelling in any sense." *Id.* at 273a; *see Buckley*, 424 U.S. at 55 ("No governmental interest that has been suggested is sufficient . . . .").

In regard to the allegedly related interest in ensuring that incumbents attend to their duties, Chief Judge Walker noted

> [T]he government has *no legitimate interest* in keeping incumbents in office at the expense of challengers. Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, "The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier." It has an interest in the former, but certainly not the latter. The decision to fundraise is the candidate's and, unless incumbent protection is a legitimate interest, not the business of the legislature.

P.A. 330a (Walker, C.J., dissenting) (emphasis in original); *see also Homans v. City of Albuquerque*, 366 F.3d 900, 919 (10th Cir. 2004) (Tymkovich, J., concurring, writing for the panel) ("Freeing politicians from having to make th[e] choice [between doing their official duties and fundraising] is not a compelling governmental interest.").

Furthermore, the record is practically void of evidence of specific amounts of time spent fundraising by incumbents or the amount of time which this takes from official duties. "To the extent that a particular amount of time was described, it was brief, such as an afternoon. Trial Tr. vol. IX at 151 (Elizabeth Ready) ('That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door.')." P.A. 274a

(Winter, J., dissenting).[25]

3. There are no compelling interests that justify limiting candidates in spending their own money on their campaigns.

This Court in *Buckley* struck down a ceiling on personal expenditures by candidates for their own campaigns, because it "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression," and because "prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds." 424 U.S. at 52-53.

Because Vermont's expenditure limits apply to a candidate's own funds, the asserted interests here are not applicable even if valid in other circumstances. A candidate cannot sell access to himself and he is not burdened with fundraising when he spends his own money. As a result, the expenditure limits are unconstitutional.

B. The expenditure limits are unconstitutionally low.

Even if candidate spending limits are somehow consistent with the First Amendment, the limits here are too low, because they will prevent candidates from

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[25]Finally, Vermont has enacted "circular, self-justifying" legislation by adopting "laughably low" contribution limits which "require candidates to spend more time fundraising than would higher limits. In other words, the Vermont law's contribution limits increase demands on candidates' time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified," P.A. 330-31a (Walker, C.J., dissenting). The Second Circuit essentially acknowledged this. P.A. 150a. If this interest were bona fide, Vermont could simply raise the contribution limits. P.A. 336a (Jacobs, J., dissenting) (rejecting the argument that "*more-restrictive* expenditure limits" are justified "to mitigate the inevitable and predictable side-effect of the *less-restrictive* contribution limits").

"amassing the resources necessary for effective advocacy." *Id.* at 21 (discussing contribution limits). The extensive record compiled in this case demonstrates that, far from being narrowly tailored to any of the State's asserted interests, these limits "are so laughably low that they cannot but impede meaningful debate of public issues," P.A. 344a (Cabranes, J., dissenting), and "are so low that they are unconstitutional by any reasonable test." P.A. 255a (Winter, J., dissenting).

1. Vermont's expenditure limits reduce candidates' historic efforts to communicate with voters.

Act 64's expenditure limits are set considerably lower than those in *Buckley* and would have a far more dramatic impact on spending. In *Buckley*, the spending limits had been exceeded by 17 of 66 (26%) major party Senate candidates and by 22 of 810 (3%) major party House candidates in the immediately preceding election. 424 U.S. at 20 n.21. In contrast, Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998, and 27% of such senate campaigns and 10% of house campaigns spent more than double the new limits. Ex. VII, E-2351. In statewide races, the State's expert reported that the spending limits were exceeded by 12 of the 29 (41%) major party contenders for statewide office between 1994 and 1998. Ex. III, E-0961. These numbers underestimate the true percentages because they include non-competitive races and do not include related expenditures.[26]

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[26] As Chief Justice Walker pointed out in his rehearing dissent: "Because Act 64 defines candidate expenditures to capture related expenditures by supporters, just to keep spending under the new law at historical levels would require setting expenditure limits *above* those historical levels." P.A. 332a (citation omitted) (emphasis in original).

Moreover, the focus should be on competitive races, where the impact would be severe. Of the 14 Senate candidates targeted by the Republican party in 1998 as the most competitive, 12 spent more than the new limits, and five spent more than double. Tr. I-196; Ex. VII, E-2354-58. Of the 17 House candidates targeted by Republican Party, 16 spent more than the new limits would allow, 9 of these spent more than double, and 4 of them spent more than triple. Tr. I-197; Ex. VII, E-2362-75.[27]

2. Vermont's expenditure limits will prevent effective candidate campaigns.

Vermont's expenditure limits prevent effective campaigns. The trial evidence demonstrated that Vermont's limits on spending in statewide races is far too low to allow most candidates to mount effective campaigns. Detailed testimony was provided by Kathy Summers, who was campaign manager for Ruth Dwyer's campaign for governor to unseat long time incumbent Howard Dean. To run an effective campaign, Dwyer would need "between 600 and $800,000." Tr. IV-81. If the campaign was limited to less than half this sum, severe cuts would have to be made. Each of the principal components of an effective campaign, direct mail, media, an effective grass roots organization, and a get-out-the-vote drive, Tr. IV-80-81, would be severely hampered.

Although direct mail is the most effective way to draw small-dollar contributions in Vermont, it is too expensive to use under the low spending limits and would have been abandoned. Tr. IV-82-83. The Dwyer campaign's

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[27]The level of spending after the trial also surpassed the expenditure limits. The major party candidates in the last two gubernatorial elections in Vermont spent two or three times more than the limits. P.A. 239a (Winter, J., dissenting). All three candidates in the last race for Lieutenant Governor exceeded the limits by 38% - 63%. *Id.*

town meeting tour would be undermined since effective town meetings require a preceding and follow-up town-wide mailing. Tr. IV-90-91. When the campaign used such mailings, they drew 80-100 people, but without them attendance dropped to 30-40 people. Tr. IV-107-08.

Dwyer's grass roots efforts would have been eviscerated because she could not hire sufficient staff to coordinate volunteer efforts or be able to do prospective direct mail to identify potential volunteers. Tr. IV-92-94. The limits would thereby "take[] away two of the most important mechanisms that I have to be able to build a grass roots network." Tr. IV-94. Moreover, the Dwyer campaign's get-out-the-vote efforts would have been cut by 70%, Tr. IV-97-98, and its media budget cut in half. Tr. IV-95-96.[28]

The Second Circuit, however, rejected Plaintiffs' claim that much higher amounts than allowed by the expenditure limits were necessary to wage effective campaigns, P.A. 154a-55a, because the District Court found that average spending in the last three election cycles was at or below the expenditure limits. P.A. 42a-43a.[29]

Past average spending fails to account for future elections that involve controversial issues, where public

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[28]William Meub, Dwyer's Republican primary opponent, also testified that under the expenditure limits "we are going to be limited in this campaign to only being able to run three ads," which was half as many as one Vermont U.S. Senator had recently spent against "a straw candidate." Tr. IV-29-30.

[29]The District Court's review of past campaigns was too limited. For instance, in 1988, spending on the gubernatorial campaign exceeded one million dollars. Ex. VII, E-2397. From 1980 to 1998, the average spending on the seven races for U.S. Senate was $1.418 million for the top two vote-getters; for the U.S. House it was $647,000. Ex. VII, E-2397. All these were statewide races, where candidates attempt to run effective campaigns.

interest is high, and where the direction of the state could be decided. For example, more money was spent in the 2000 election than in any prior Vermont election, because civil unions, same-sex marriage, and other controversial issues were at stake. P.A. 238a (Winter, J., dissenting). In addition, the related expenditure provision was not a part of Vermont law before Act 64 and, therefore, was not accounted for in calculating past spending. *Id.* at 234a. As a result, the past spending averages grossly underestimate the amount candidates would actually "spend" in the future.[30]

For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor. *See supra* note 12. The expenditure limits here are woefully inadequate.[31]

C. Vermont's spending limits disproportionately harm challengers.

Just as too low contribution limits benefit incumbents, *Shrink*, 528 U.S. at 404 (Breyer, J., concurring), too low expenditure limits could "insulate [incumbents] from effective electoral challenge." *Id.* at 402. As set forth extensively above, the meager expenditure limits do not allow challengers to overcome incumbents' advantages.

This should not be surprising since the justifications for Act 64 all center around incumbent protection. The

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[30]Past spending averages also do not include the costs of compliance with the new, complicated Act. P.A. 235a (Winter, J., dissenting). The burdensome related expenditure provision could very well necessitate the hiring of additional staff to monitor related expenditures. *See id.* at 226a; *see also id.* at 231a.

[31]Candidate expenditures in the two statewide elections since the enactment of Act 64 have far exceeded Act 64's expenditure limits. P.A. 239a-40a (Winter, J., dissenting).

time-protection "interest" "is less about increasing person-to-person contact with voters than it is about limiting their opponents' overall contact with voters." P.A. 275a (Winter, J., dissenting). Further, measuring "effective campaigns" by whether a campaign achieves only a "level of notice" ensures that "an incumbent's campaign starts at the 'level of notice' at which a challenger's campaign may be stopped by government." *Id.* at 285a. And the dreaded "arms race," which the State seeks to stop at all costs, refers, in reality, "to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

Vermont provides that incumbents can spend only 85%-90% of the limits. 17 V.S.A. § 2805a(c). William Meub described this as a "farce," since the "incumbency handicap" should be 50%. Tr. IV-31. There is no evidence in the record that this "fig leaf" is "sufficient to overcome the numerous and powerful advantages of incumbency." P.A. 339a n.6 (Jacobs, J., dissenting).[32]

D. There are less restrictive alternatives.

The limits are not narrowly tailored because there are less restrictive means to prevent the reality and appearance of corruption. "The interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Further, there are less restrictive means of protecting candidates' time. Contribution limits could be raised so that candidates can raise more money from their existing donors, the State could provide

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[32]Exacerbating the harm to challengers, the limits apply over a two-year period. This means that candidates must divide their expenditure amounts between primary and general elections. Because incumbents face primary challengers less often than non-incumbents, they will generally have more money left for the general election.

additional staff to allow officeholder candidates to attend to their official duties more efficiently, and Vermont could provide for public financing with spending caps for those that elect to receive public funds. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights, and they have been approved by this Court.

VII. Vermont's Presumption of Coordination Provision Is Unconstitutional.

Act 64 includes a presumption that an expenditure made by a political party or political committee that benefits six or fewer candidates is a "related expenditure," subject to candidate contribution and expenditure limits. 17 V.S.A. § 2809(d). The Second Circuit, in a cursory, three-paragraph discussion, upheld the presumption, as it related to the contribution limits,[33] because it is rebuttable rather than conclusive. P.A. 183a-84a. The court summarily announced that "[t]he Constitution does not bar the use of rebuttable presumptions in this context." *Id.* at 183a.

The Second Circuit, however, failed to recognize the unconstitutional burden that this "rebuttable" presumption imposes on First Amendment rights. While the court conceded that "an accused party" can be forced into a court proceeding, *Id.* at 184a; *see* 17 V.S.A. § 2809(a), (e), it diminished this heavy burden[34] by stating that "there are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent." P.A. 184a. However, such rebuttable presumptions

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[33]The court, however, remanded consideration of the related expenditure provision as it relates to "expenditures." P.A. 189a.

[34]It is well established that subjecting First Amendment freedoms to investigation itself can unconstitutionally burden these freedoms. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

require private parties to "bear the costs of litigation and the risk of a mistaken adverse finding," which "must necessarily chill speech in direct contravention of the First Amendment[]." *Riley v. National Federation of the Blind*, 487 U.S. 781, 794 (1988). Moreover, the presumption unfairly places on the candidate and the political organization the burden of proof to prove a negative – that coordination did not take place. [35]

But ultimately the greatest burden is that it converts constitutionally protected independent speech to speech subject to contribution and expenditure limits by failing to require actual "prearrange[ment] or coordinat[ion] . . . with the candidate or his agent." *Buckley*, 424 U.S. at 47. Only expenditures that are "controlled by or coordinated with" a candidate may be treated as contributions. *McConnell*, 540 U.S. at 219. This Court has "repeatedly . . . struck down limitations on expenditures 'made totally independently of the candidate and his campaign,'" *Id.* at 221 (quoting *Buckley*, 424 U.S. at 47).

The First Amendment places the burden of persuasion on the government to show that the speech is protected. *Francis v. Franklin*, 471 U.S. 307 (1985). Thus, a mandatory presumption, even a rebuttable one as here, *see id.* at 317, imposes an unconstitutional burden on speech if it shifts the burdens of proof or persuasion from the government to the speaker to prove that the speech is protected. *Speiser v. Randall*, 357 U.S. 513, 526-28 (1958). Furthermore, the "connection between the two facts" must be "accurate in the run of cases." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

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[35] Furthermore, the candidate and the political organization face steep civil penalties, if the expenditure is found to be related and it surpasses the applicable contribution and/or expenditure limits, of up to $10,000 for each violation. 17 V.S.A. § 2806(b).

This is not true here since "prearrangement or coordination" has nothing to do with the fact that the ad mentions six or fewer candidates.

In *Colorado I*, this Court struck down a presumption that all party spending is coordinated, holding that "*convincing evidence* [that] . . . a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system" is required. *Colorado I*, 518 U.S. at 617-18 (emphasis added). Coordination of expenditures requires factual evidence of coordination, and "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Since Act 64's presumption does not require the government to prove that "related" expenditures are actually prearranged, coordinated with, or controlled by a candidate, the presumption unconstitutionally sweeps in independent expenditures, "significantly impair[ing] the ability . . . to engage in direct political advocacy and 'represent[ing] . . . substantial . . . restraints on the quantity and diversity of political speech.'" *Id.* at 615 (citations omitted).

VIII. The State's Arguments Would Justify a Government Ban on Privately Funded Campaigns.

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91. Vermont seeks to reverse this presumption by imposing draconian restrictions on the speech of candidates, which it justifies by "broadly defined" interests in corruption and incumbent time-protection. If accepted by this Court, Vermont will have justified more than its "laughably low" contribution and expenditure limits. It will have justified abolishing privately funded campaigns.

First, the State seeks to justify limiting all contributions, not just those that are large enough to give rise to a perception of corruption. Application of the anti-corruption interest to all contributions "extend[s] *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions." *Carver*, 72 F.3d at 639. This result would effectively remove candidate contributions from the protection of the First Amendment and provide a justification to abolish all private funding of campaigns.

Second, the State broadly defines "corruption" to include "special access or the appearance of special access of donors to officeholders," the influence of "bundled" contributions, and decreasing "citizen confidence in the electoral process." P.A. 255a (Winter, J., dissentig); P.A. 128a-35a. There are two types of "special access" identified by the Second Circuit, "the fundraising system," P.A. 101a, and "officials . . . more likely to return donors' phone calls." *Id.* at 140a. A key fundraising method is "selling access," for example, fundraising events where candidates or public officials appear and the attendees pay to attend. If fundraising receptions or dinners are inherently corrupt, then a key element of fundraising for all campaigns can be abolished. Further, it is only human nature to be grateful to one's supporters, whatever the nature of that support, and to return their phone calls. If natural human gratitude is now corruption, then certainly corruption will infect all of politics and private funding of campaigns can be abolished, and maybe even elections themselves.

"Bundling" is where "special interests" provide financial support "by way of 'bundling' smaller contributions from a particular company or industry." *Id.* at 133a. While the Second Circuit acknowledged that *Buckley* seemed to dismiss this concern in footnote 64, *id.*, (citing *Buckley*, 424 U.S. at 56 n.64) ("If a senatorial candidate

can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communications?") (internal quotation marks omitted)), this Court went further than that, in upholding the FECA's contribution limit, by emphasizing, rather than bemoaning, the fact that "persons [remained] free" to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *Buckley*, 424 U.S. at 28, and citing the fact that "the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 28 n.31. But if multiple lawful contributions from people with a shared interest is corruption, then nothing short of abolishing private funding of campaigns will stop it.

"Citizens' confidence in the electoral process" is certainly desirable, but it is defined broadly here as "Vermonters . . . troubled by how money influences campaigns," P.A. 56a, "voters . . . extremely concerned about the influence of special interest in the political process," P.A. 130a, and "94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would 'reduce the power of special interests.'" *Id.*. This is simply a description of the healthy scepticism that the American people have about politics and politicians and, if credited with the power to uphold the limits here, would justify abolition of private funding of campaigns generally.[36]

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[36]If this description of corruption were extended to the "perception of corruption" and is credited, even without factual support, it would have no bounds. A subjective perception of corruption that has no basis in fact cannot be refuted. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Furthermore, it is a "quintessential self-fulfilling prophesy." P.A. 277a (Winter, J., dissenting).

Third is the concern of the Second Circuit that "candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests" and are concerned "about the reaction of contributors." *Id.* at 131a. Of course, in a representative democracy, politicians will be concerned about the reaction of people generally, and of their supporters, or potential supporters, particularly, to their actions in office. It would be both silly and dangerous to define corruption this way.

> If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislators could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

Russell v. Burris, 146 F.3d 563, 569 (8th Cir. 1998); *see also McCormick v. U.S.*, 500 U.S. 257 (1991) (reversing legislator's Hobbes Act conviction for soliciting a campaign contribution and then introducing legislation favorable to the contributor).

Finally, if the desire for campaign cash to fund an "arms race" can justify both 'laughably low" contribution and expenditure limits, it is sufficient to ban all privately funded campaigns,[37] and the reversal of the presumption

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"The confidence of Vermont citizens in their state government is unlikely to be substantially enhanced so long as Act 64's proponents make unsupported claims about the corrupt nature of that government." *Id.* 277a.

[37]The breadth of these arguments and their effect on private funding of campaigns should not be surprising, since one of the prime supporters of Act 64, and counsel for the Respondent-Intervenors, is the National Voting Rights Institute, which considers "Getting money out of politics [to be] the unfinished business of the Voting Rights

of the First Amendment would be accomplished. The government will have taken away the core of the First Amendment, leaving only its periphery.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A. §§ 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.

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Movement." http://www.nvri.org/about/wealth.shtml (last visited Dec. 2, 2005). This organization has brought several lawsuits to have privately funded campaigns declared unconstitutional. *See, e.g., Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996); *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999).

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In the
SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
Petitioners / Cross-Petition Respondents,

v.

WILLIAM H. SORRELL, *ET AL.*,
Respondents / Cross-Petitioners,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
Respondent-Intervenors / Cross-Petitioners.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

Brief Of Respondents/Cross-Petitioners William H. Sorrell, *Et Al.*

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party that primarily benefits six or fewer candidates is presumed to be a coordinated expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Petition Respondents in No. 04-1697*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Petition Respondents in No. 04-1697*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for a Writ of *Certiorari* in No. 04-1528 was placed on this Court's docket on May 16, 2005. Pursuant to Rule 12.5, the Conditional Cross-Petition of William H. Sorrell, *et al.* (the "State") and Vermont Public Interest Research Group, Inc. ("VPIRG"), *et al.*, No. 04-1697, was timely filed by transmitting it to the Clerk of the Court on June 14, 2005. Jurisdiction lies under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Act 64

A. The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in politics. The 65 hearings, at which 145 witnesses testified, unequivocally demonstrated that, despite existing contribution limits and disclosure laws, Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. Randall Petitioners' Appendix ("P.A.") 31a-32a.

The Legislature made detailed Findings that set forth Act 64's purposes and the conclusions that body drew from the record before it. The Findings specify how large campaign contributions and unrestrained campaign expenditures reduce public confidence in government, pressure officials to give access and respond to large contributors in preference to those who can afford to give little or nothing, increase the appearance that officials are unduly influenced by monied interests at the expense of the best interests of Vermont citizens, marginalize regular citizens from the political process, force officials to divert their time and energies from their duties to limitless fundraising, decrease robust debate of issues and candidate interaction with the public, and financially prevent many Vermonters from seeking public office. Joint Appendix ("J.A.") 20-23.

The Legislature concluded that a carefully drawn law containing both expenditure limits and contribution limits would work directly to remedy all of the above ills; would restore integrity to the electoral process; would permit healthy, vibrant and effective campaigns; and would ensure the Vermont Constitution's directive that "'all elections ought to be free and without corruption.'" P.A. 35a (quoting Vt. Const. ch. I, art. 8).

B. Significant testimonial and documentary evidence gave full support to the Findings. Even with Vermont's prior contribution limits, the record showed how the need for unlimited cash allowed contributors and groups of contributors to obtain preferential access and exert undue influence over officials. Governor Howard Dean confessed that: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." P.A. 93a-94a; *see* Exs.[2] I:92; II:732 (access and attention are commodities). The President of the Senate, Peter Shumlin, admitted that his decisions are sometimes made "based upon that whole lot of money I raised." Ex. I:291; *see* Exs. I:205 (money "plays a role in decisions"); III:795-97 (former Treasurer bowed out of re-election race after awarding no-bid contracts to firms that had contributed to his campaign); II:425-26 (influence of monied interests helped defeat bottle bill); I:217 (contributions given to obtain influence); II:503 (same); II:492 ("money buys influence"); I:349 (officials "more accountable" to contributors); II:428 (money controls candidates); I:369-70 (concern over "purchase of influence"); I:217 (unsolicited corporate donations were made to influence); I:405-06 (lobbyists can influence officials' decisions based on past giving and future need).

The Legislature heard that parties and candidates, too, exploit such a system by seeking funds from those who regularly come before them. Exs. II:511 (aggressive targeting

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[2] Ex. __ and Tr. __ refer to the pages of the binders of trial exhibits and transcripts that comprised the record in the court of appeals.

of lobbyists for contributions); II:505 (lobbying and contributing "inextricably...linked"); I:299-300 ("close" connection between contributions and support of positions); I:203 (similar).

The Legislature was further aware that such dubious practices, and numerous others, had been reported to the people of Vermont through the media, thereby fueling the public perception that officials are unduly influenced by large contributions and the overwhelming need for campaign cash.[3]

The State's regime of large contributions and unrestricted spending, lawmakers learned, had left many Vermonters on the outside looking in. A third-generation farmer, for example, testified that small family farmers typically cannot afford to contribute money to political candidates, and thus cannot obtain the influence held by many corporations. Ex. I:374-75, 92 ("average Vermonter can't afford the price of admission" to political system).

In addition, Legislators studied campaign finance abuses that had occurred outside Vermont and sought to guard against them. Exs. V:1737 (Vermont "is at risk of slipping into the same special interest swamp that has become our nation's capital"); V:1735-36 (Republican Party concerned over national scandals reaching Vermont); III:811-26 (press accounts of national campaign scandals); *see also* Exs. I:272, 291-92, 383; II:483-84, 732 (Legislators feared spread of corruption).

The legislative record also showed that the pursuit of campaign monies had become very time consuming.

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[3] Exs. III:747 (concern that tobacco donations caused weakening of anti-smoking bill and that union donations had ensured passage of pro-worker law); III:789 (pressure to secure contributions blocked health care reform); III:785, 787 (contributions made by slate companies to Legislators considering quarry bill); III:805-07, 809-10 (donations by Tobacco Institute followed defeat of tobacco bill); III:747, 763, 777 (public attitudes toward large donations); *see also* Trs. IX:180-84; X:6-9.

Fundraising had diverted officeholders from their official duties, had lessened the amount of time that could be spent with the public, and had limited the scope of the views considered by officials and candidates. Exs. I:204, 209, 353; II:603; J.A. 21 (Finding (a)(11)).

Numerous witnesses additionally testified that Act 64 was necessary to loosen the grip that incumbents had on elections in Vermont. Exs. I:231, 376-77; II:525, 648-49. By limiting incumbents' ability to amass large campaign war chests and greatly outspend opponents, witnesses forecasted that Act 64 would increase meaningful electoral competition. Exs. I:92, 395-96, 371-72, 376-79; II:484, 730.

Based on its own experience and the record before it, the Legislature determined that Vermont's voluntary spending caps, which few had accepted,[4] coupled with contribution limits, had been and would continue to be inadequate to deter political corruption and its appearance, to ensure that officials could devote sufficient time to their duties, and to restore public confidence in government. While contribution limits play a vital role in deterring individual corruption, so long as candidates require ever-increasing pools of campaign cash, they would still be beholden to large, monied interests and distracted from their duties. As a result, the Legislature concluded that limits on candidate expenditures as well as on contributions were necessary to respond comprehensively to the problem.

In setting the appropriate levels for those limits, the Legislature painstakingly considered factors unique to Vermont such as population, media costs, historical information on past spending and contributing in campaigns, Vermont's previous mandatory and voluntary spending limits, citizen polls reflecting the amounts that Vermonters consider to be excessively large donations, its members' own individual experiences as candidates, the testimony of numerous witnesses

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[4] Adherence to voluntary spending limits dropped dramatically between 1993 and 1998. P.A. 28a; J.A. 29, 34.

concerning the appropriate levels for the limits, and the offices to which the limits would apply. Exs. I:92, 254-63, 267; II:443, 533-34, 645-47, 664-80; V:1686-1734; Trs. IX: 203-04, 226-28, X:18-20; *see also* P.A. 32a-33a, 100a. It set the limits at levels assiduously tailored to deter corruption and its appearance while ensuring effective and robust campaigning.[5] It further permitted challengers to spend more than incumbents.

The Legislators also focused on the need to protect against circumvention of Act 64's limits. They imposed limits on party and political committee donations and on expenditures that were coordinated with a candidate. Truly independent expenditures were not restricted.[6]

II. Proceedings Below

A. During ten days of trial, the district court accepted testimony from 34 witnesses, including citizens, officials, candidates, experts and party leaders, and admitted approximately 135 exhibits, amounting to more than 3,000 pages. The court reviewed the legislative record and adopted nine of the Findings supporting Act 64. P.A. 34a-35a; J.A. 20-22.

After weighing the evidence and making credibility determinations, the court concluded that the "threat of corruption in Vermont is far from illusory. Evidence provided by citizen polls and comments by public officials demonstrate that the threat is quite real." P.A. 56a. The public's perception of that corruption is equally clear: "it is beyond argument that the public perceives corruption in the political electoral system." *Id.*

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[5] In 2005, the Legislature tied increases in the expenditure limits to the Consumer Price Index. 17 V.S.A. §2805a(e).

[6] Act 64 combines features from three separate bills. Exs. I:1-25, II:691-706, 707-17. In addition to the challenged limits, it includes reporting provisions, creation of an on-line database with candidate biographies and position statements, and a public funding option for candidates for governor and lieutenant governor. P.A. 1a-20a.

The court ruled that the expenditure and contribution limits of Act 64 directly furthered compelling interests, including deterring actual and perceived political corruption and freeing up officeholders from the demands of fundraising so they can perform their official duties. P.A. 36a-38a, 59a, 63a-66a. It concluded that the levels established for those limits were appropriate for Vermont and would permit effective campaigning. P.A. 39a-44a. Such legislation, the court found, was critical to reverse the erosion of public confidence in elected officials and to maintain the integrity of the electoral system. P.A. 36a-38a, 56a, 59a, 65a-66a. The trial evidence fully supported those determinations.

Trial witnesses recounted numerous examples of the preferential access and treatment given by officials to special interests and large contributors. In stark contrast to ordinary constituents, such persons and entities had their telephone calls returned, obtained meetings with officials, and were afforded a different quality and quantity of attention and responsiveness by politicians. *See* Trs. VII:72-74 (Vermont politicians usually give special consideration to requests from large donors); V:24; VIII:24; IX:167, 194-96.

Evidence demonstrated that such purchased influence impacted or sought to impact a number of governmental actions, including environmental exemptions for the slate industry, modifications in tobacco laws, participation in a land use action, changes to health care reform, defeats of a bottle redemption bill and a food labeling bill, and the creation of a tax exemption. Trs. V:54-56, 183-84; VII:62-74, IX:92-95, 104-09, 120-23, 174-77. The court concluded that consideration of funding sources "frequently shapes the legislative agenda in Montpelier and often determines whether a bill will get enough support from the Senate leadership and committee members to move forward." P.A. 37a.

The need to raise unlimited funds, the court determined, also makes it "increasingly difficult" for officials to pursue

initiatives adverse to large donors and donor groups. P.A. 37a-38a. With an ever-increasing need for monies, candidates always consider what the positions of large funding sources are when staking out a position of their own. Tr. VIII:24-25. Expert testimony from both sides confirmed the link between officials' voting behavior and the sources of their campaign contributions. P.A. 38a.

In addition, the district court validated the Legislature's concern over the public perception of corruption resulting from a system of large contributions and unlimited spending. P.A. 29a, 56a. Sen. Rivers testified that "many ordinary people...believe that their government is not about them, but about powerful, special interests.... [and] that is corrosive and damaging to democracy." Tr. VII:88; *see* Tr. V:170. Plaintiffs' witnesses also recognized the public's concern over the corrupting effect of money in politics. P.A. 36a-37a; Trs. II:212; IV:66-67, 219-20, 259.

To support its finding regarding the perception of corruption, the court further relied upon media reports of officials' comments describing the insidious impact of money on government, and upon survey evidence. P.A. 29a, 37a; Exs. III:763 (Sen. Spaulding: "money is a negative influence on the impartial ordering of priorities and passage or failure of bills"); III:772 (Sen. Shumlin: money "buys access to the system .... [and] it adversely influences a citizen legislature"); Tr. VII:151-52; Ex. III:847-48 (70% of Vermonters believe that the wealthy and large corporations have too much influence over officials, while 74% believe ordinary Vermonters have too little).

Testimony from knowledgeable witnesses also demonstrated that the "arms race" to obtain campaign funds distracts officeholders from their duties and separates them and candidates from interactions with voters. P.A. 38a. Without spending limits, "you become indentured to people who have got the money. So you spend less time on the ideas and more time harvesting the money." Tr. V:116; *see also* J.A. 28

(Landell Plaintiffs' admission). Proof that officials are pulled away from their duties to solicit campaign money from interest groups and donors "came from both Plaintiffs and Defendants." P.A. 36a.

Trial evidence additionally confirms the court's conclusion that candidates can conduct effective campaigns under the spending limits of Act 64. P.A. 43a-44a. Campaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country. *See* Randall Br. 32 (conceding same). For example, Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43.

As the court noted, the low population of Vermont's electoral districts supports the reasonableness of Act 64's spending limits. P.A. 42a. Candidates for statewide office in Vermont compete for votes from a population that is smaller than that of a single California senate district. J.A. 43. Vermont's House districts, the second smallest in the nation, average 4,000 people in a single-member district, and 8,000 people in a two member-district. J.A. 28, 41-42. In 1998, the average number of votes received by winning candidates in a single-member House district was only 1,022. J.A. 42. Vermont's Senate districts are correspondingly small, with about 19,600 constituents per senator. *Id.*

The small population of these electoral districts means that voters expect low-cost campaign methods and direct contact with candidates. P.A. 44a & n.22; Trs. III:29; V:39-40; VII:17; IX:134; X:185; Exs. IV:1348, 1437; V:1826; J.A. 41 (all discussing door-to-door campaigning). Witnesses for both Plaintiffs and Defendants described effective, inexpensive methods of campaigning commonly used in Vermont, including: debates, Trs. I:59-60; II:200-01; literature drops and booths at fairs, Trs. I:61; II:195-95; Ex. IV:1348, 1437; spaghetti or church suppers and barbecues, Tr. IX:134-35, 220-21; sign-waving and supermarket visits, Tr. IX:134-35; public

access or cable TV ads, Trs. IV:49-51; IX:134-35; press releases to obtain free media coverage, Tr. I:61; website and e-mail, and distribution of candidate's biography and position statements through the Secretary of State's website, Tr. IV:57-58, *see also* P.A. 44a; J.A. 31. Indeed, few candidates hire paid campaign staff or advertise on television, and, even when used, television ad costs in Vermont are relatively low. P.A. 44a; J.A. 24-30 (admitting same); J.A. 41; Trs. VII:16-17; IX:49, Ex. VII:2699.

The district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont, calling those claims "wholly unreasonable." P.A. 40a, 43a. The court found that "[t]he majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow." P.A. 43a.

For legislative races, data analyzed by the State's expert and relied upon by the court revealed that average spending for House seats was almost uniformly below the levels set in the new statute. P.A. 39a-40a, 57a; J.A. 88. In the two-member, three-member and six-member Senate districts, candidates under-spent the limits applicable to these districts by amounts ranging from $590 to $7,120. Only in single-member Senate districts did average spending exceed the new limits. J.A. 87.

Voluminous trial evidence also supported Act 64's contribution limits. Both the culture and economy of Vermont led the district court to conclude that even small donations are strong acts of political support. P.A. 41a-42a. It found that the law's contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public." P.A. 59a (citing testimony of seven witnesses, including three of the Plaintiffs). The court determined that Act 64's contribution limits would have affected fewer than 10% of

all contributions made over the three preceding election cycles. P.A. 57a.

After evaluating the trial testimony, the court further found that "the more credible evidence shows that [effective] campaigns would indeed be possible" under the contribution limits set by Act 64. P.A. 40a-41a & n.20 (citing testimony of "candidates, campaign managers, and past and present government officials"). Analysis of the one race that had been held at the time under Act 64 confirmed that finding. P.A. 41a, 58a (Burlington mayoral candidates raised large sums and ran effective campaigns under $200 contribution limit). Finally, the court found that Act 64's limits compared favorably to those that had been upheld in the larger and more populous states of Missouri, Maine and Florida. P.A. 57a-58a & n.24.

The court rejected the contention that the spending and contribution limits of Act 64 would advantage incumbents. Evidence established both that the prior campaign finance system had entrenched incumbents, Trs. VII:148; X:33; 48; Exs. II:525, 529; V:1692, 1694, and that Act 64 would increase electoral competition, Trs. V:52, 148; VIII:56; IX:131-32; X:161.

Ultimately, the district court upheld nearly all of the contribution limits of Act 64.[7] P.A. 24a-25a. Regarding the expenditure provisions, the court found that they were supported by compelling interests and were set at appropriate levels for Vermont. P.A. 66a. It noted: "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* The court refused to sanction the limits, based only on its view that all spending caps were prohibited by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). P.A. 66a.

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[7] The court invalidated Act 64's limits on out-of-state contributions and held that the limits on political party contributions to candidates were too low. P.A. 67a-68a, 76a.

B. After carefully and independently reviewing the full trial court record, the court of appeals upheld the lion's share of Act 64. P.A. 111a, 125a, 144a, 188a-89a.

1. Over a dissent, the Second Circuit held that *Buckley* was not a *per se* bar to consideration of spending limits. It concluded that two compelling interests supported Act 64's expenditure limits. First, the court ruled that Vermont has a compelling interest in safeguarding the political process from the corruption and the appearance of corruption created by unfettered campaign spending and the contributor-dominated system that results from it. Given an unlimited desire for funds, large contributors and special interests with access to significant sources of contributions, are allotted "greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns." P.A. 134a. This reliance often causes officials to adopt positions, set agendas, or take other actions either to secure funding or to ensure continued favor with past donors. P.A. 130a-31a. It further makes it especially hard for officials to take positions that would cut them off from large sources of campaign monies. P.A. 131a-33a.

The court found that Vermonters rightly perceive that "the attention of their public representatives may be available for a price." P.A. 129a. Such a practice, "is pernicious because it is bought," and it "exacerbat[es] cynicism and weaken[s] the legitimacy of government power." P.A. 134a. Act 64's spending limits, the court ruled, directly further the goals of deterring such corruption, ensuring accessibility and accountability of officials, and protecting the public's faith in the integrity of government. P.A. 134a-35a, 144a n.18, 149a-50a.

Second, the Second Circuit determined that Act 64's spending limits were additionally supported by Vermont's compelling interest in protecting candidates' and officials'

time.[8] The court ruled that the demands of seeking campaign dollars often force officials and candidates to engage in fundraising rather than attending to their public duties or interacting with voters. P.A.135a. "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office." P.A. 139a; *see* P.A. 144a. This pressure to raise funds not only diverts officials from the public's work, it narrows the scope of the views and information they and candidates receive because their available time is consumed by donor groups with their own agendas. P.A. 140a.

The Second Circuit further concluded that the expenditure limits were set at levels that directly advanced the above compelling interests while permitting effective campaign advocacy. P.A. 148a-57a. It ruled that Plaintiffs' emphasis on certain high-spending races provided no basis to overturn the law. P.A. 156a. "[A]mple evidence" established that effective campaigns could be run under Act 64. *Id.* Nonetheless, the Second Circuit remanded for additional narrow tailoring analysis regarding other possible regulatory options and whether higher expenditure limits might equally serve the identified compelling interests. P.A. 157a-158a.

2. The Second Circuit unanimously upheld virtually all of Act 64's contribution limits, including the party contribution limit invalidated by the lower court. P.A. 168a-170a, 177a-78a, 183a-84a (rejecting only Act 64's out-of-state contribution limit). The court concluded that those limits deter the "real and perceived threat of corruption in Vermont," and are closely drawn to ensure effective campaigns. P.A. 171a-72a. The court also upheld the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a). P.A. 183a.[9]

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[8] The State asserted five compelling interests, only two of which were examined by the court below. P.A. 127a, 145a.

[9] The court also remanded three matters that are not presently before this Court, including the constitutionality of treating related

SUMMARY OF THE ARGUMENT

Vermont enacted spending limits because the never-ending desire for campaign money had distorted the political process and undermined public faith in those who govern. Even with contribution limits in place, candidates and officials still devote great time and resources to courting industries or special interest groups with access to large blocks of contributions. As the record here convincingly shows, the resulting close ties among such donor groups, candidates and elected officials often determine what positions candidates and officials take on issues, which matters are given legislative priority, who gets access to candidates and officials, and where candidates and officials spend their time. This type of influence and access is "pernicious because it is bought." P.A. 134a.

The Vermont Legislature carefully crafted Act 64 to address these grave concerns and carry out the State's prime duties of ensuring the integrity of its political processes and maintaining citizen confidence in government. While this Court invalidated federal spending limits in *Buckley*, the same result does not follow here. In contrast to *Buckley*, the instant record establishes that spending limits directly further the compelling interests of deterring corruption and its appearance, and of protecting the time of officials and candidates from limitless fundraising. Expenditure limits militate against the undue access and influence now afforded donors and allow officials to decide issues based on the merits, not the wishes of their financiers. They permit officials to attend to their public duties instead of seeking private dollars, and assure that candidates and officials have the opportunity to hear the views of all citizens, regardless of whether they are donors. Act 64's spending limits are specifically targeted to further such compelling interests and are set at levels sufficient to allow vital and effective campaigning. Indeed, between 1994 and 1998,

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expenditures as candidate expenditures and of limiting transfers between state and national parties. P.A. 168a, 180a-81a.

the vast majority of candidates spent at or below the levels set by Act 64. As such, the limits are narrowly tailored.

While such weighty interests and tailoring satisfy *Buckley's* exacting scrutiny, should the Court disagree, the State asks that the Court revisit the constitutional standard for spending limits set out in *Buckley*. That case did not fully consider that critical constitutional interests, including some going to the very core of our form of government, lie on both sides of this issue. Balancing of those interests, as the Court has done in other contexts, leads to the conclusion that Act 64's spending limits are constitutional.

Plaintiffs' challenge to Act 64's contribution limits does not withstand inquiry. The Court has frequently found that such limits serve the critical interests of reducing actual and perceived political corruption. The record here confirms those judgments and details numerous instances where contributors received or were perceived to have received undue access to and influence over officials. Such access and influence impacted government policy and reinforced the public's perception that "big money" controls what happens at the state capital. To address those concerns, Act 64's contribution limits are directed at amounts considered "suspiciously large" and would have affected fewer than 10% of the contributions made between 1994 and 1998. The limits permit both meaningful contributions and effective campaigns at all levels. They are fully constitutional.

Act 64's limits on contributions by political parties to candidates are equally valid. They, too, deter real and apparent corruption and also avoid evasion of Act 64's other limits. Parties are not constitutionally entitled to higher contribution limits than other donors. Act 64 allows parties to make meaningful contributions to candidates, and they remain free to engage in unlimited independent spending to support candidates or engage in traditional party building activities, such as get-out-the-vote efforts.

Plaintiffs' argument against the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a), misconstrues the law's treatment of coordinated expenditures. Act 64 places no limit on independent spending. Section 2809(d) establishes only a non-conclusive, evidentiary presumption for a narrow category of expenditures most likely to have been coordinated with a candidate. Under Vermont law, such a presumption arises only at trial and shifts just the initial burden of production, not the burden of persuasion. It does not require candidates or parties to disassociate themselves from a communication or take any action whatsoever. It imposes no burden of constitutional magnitude and does not chill speech.

ARGUMENT

I. Act 64's Spending Limits Are Constitutional

Vermont's spending limits pass the exacting scrutiny set out in *Buckley*. 424 U.S. at 44.[10] They directly further the critical interests of deterring corruption and its appearance, thereby fulfilling the State's core duties of ensuring the integrity of Vermont's electoral process and restoring public confidence in government. Expenditure limits additionally serve the equally compelling interest of assuring that candidates and officeholders devote less time to fundraising and more time to interacting with constituents and attending to their duties. Vermont's nine decades of experiments with campaign

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[10] Any suggestion that *Buckley* precludes such analysis is unfounded. *Buckley* rejected spending caps based only on the summary judgment record before it and the implicit prediction that contribution limits and disclosure would work to end corruption. The contrary record here establishes that spending limits are necessary to address corruption and its perception in elective politics. Likewise, *Buckley* did not even consider, much less reject, the time protection interest as a basis for upholding spending limits. 424 U.S. at 55-57. Respondents VPIRG, *et al.*, fully discuss why *Buckley* does not bar consideration of spending limits or the asserted compelling interests, and the State adopts that argument.

disclosure laws, contribution limits, and voluntary expenditure limits, P.A. 26a-27a, combined with the record created below, demonstrate how compelling these interests are and fully justify the particular levels of spending caps set by the Legislature to safeguard Vermont's system of government.[11]

A. States Have Unique Duties To Protect Their Electoral Systems And Maintain Citizen Faith In Government

This Court has often recognized the special responsibility a state has to "preserv[e] the integrity of its election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(quotation omitted); *see Gregory v. Ashcroft*, 501 U.S. 452, 461-63 (1991); *Oregon v. Mitchell*, 400 U.S. 112, 125-26 (1970)(opinion of Black, J.). "Preserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978)(quotation omitted).

The importance of protecting states' representative structures and their ability to determine and police the methods

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[11] Judge Winter's dissent incorrectly relies upon nonrecord evidence to argue against Act 64. *See, e.g.*, P.A. 238a; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986)(court "must affirm or reverse upon the case as it appears in the record"). Indeed, the dissent illustrates the perils of relying on such evidence, which the parties have had no opportunity to explain or contest. For example, the suggestion that voter turnout in the 2000 election was "perhaps...record breaking," P.A. 278a, is mistaken for several reasons: (1) 2000 was a presidential election year, which has higher turnout; (2) there were more eligible voters in 2000; and (3) voter turnout in 2000 *as a percentage of Vermont's voting age population* was lower than in some previous presidential election years. *See* Vermont Elections Data, *at* http://vermont-elections.org/elections 1/1974to2004RegPop.html. Nonrecord evidence of this sort is not appropriate for judicial notice under Fed. R. Evid. 201.

of electing their own officials is enshrined in the Constitution itself. U.S. Const. art. I, §§2, 4; art. IV, §4; amend. X; *see Gregory*, 501 U.S. at 463; *Storer v. Brown*, 415 U.S. 724, 730 (1974). And, Vermont's Constitution specifically assures Vermont citizens that they shall have an equal ability to vote, run for office and have equal access to members of the Legislature, and that elections shall be "free and without corruption." Vt. Const. ch. I, art. 8; ch. II, §8 (Statehouse "open for the admission of all persons").

Indeed, avoiding corruption and the appearance of corruption in government and elections is "critical...if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000); *Bellotti*, 435 U.S. at 787 (1978)(state interest in "preventing diminution of the citizen's confidence in government"). Act 64's spending caps directly further the State's paramount duties of preventing real and perceived corruption and restoring public confidence in the electoral system.

B. Vermont's Spending Limits Deter Real And Apparent Corruption

While contribution limits are assuredly an essential weapon against political corruption, *see infra* Section III, they do not address all its manifestations. As Vermont's experience shows, without spending limits candidates constantly fear that their opponents may outspend them, and they are forced to seek larger and larger campaign war chests. Tr. VIII:57; *see also* Trs. V:32-33; VII:75-78; IX:133-34. In such an "arms race" for funds, special interests exert undue influence upon lawmakers. P.A. 134a. Whether through bundling or grouping of donations from multiple members of an industry or group, or otherwise, special interests remain major funding sources for candidates. Exs. I:218-19; III:0783; I:196 ("[if] all the money that came into

me ... were people that I could identify were teachers, I would know I'm in the NEA's pocket"); Tr. VIII:192-94 (in small state a single interest can exert significant pressure through organized giving).

What the special interests receive in return are access to and untoward influence over candidates and officials. As the district court stated, the system of unlimited spending makes it very difficult for officials to take positions adverse to their funding sources, even if the officials disagree with them. P.A. 37a-38a. Spending limits reduce the candidates' need for funds thereby relieving the pressure to afford special interest groups undue access and influence based solely upon their financial strength. Trs. IX:195-96; VII:88.

The record is punctuated by revealing testimony describing the preferential access and influence accorded special interests due to their ability to generate campaign funds. Senate President Shumlin confessed that special interests obtain access on that basis: "I guarantee you it happens." Ex. I:297; *see also* Exs. I:341 (senator acknowledged undue influence of money from "Wall Street, the banking industry, the insurance industry, the pharmaceutical industry"); II:505 (fundraising and lobbying "completely linked"); I:375 (Monsanto spending coincided with legislative consideration of milk labeling bill); III:902 (Governor confessed "money does buy access"). Peter Smith, former holder of numerous state offices, explained that politicians "will spend a different kind of time and a different kind of attention" on those who control large blocks of contributions. Tr. VIII:24.

With an unlimited desire for funds, officials are forced to keep one set of eyes on the merits of an issue and another on their pocketbooks. Indeed, before taking a stance on a piece of legislation, legislators typically ask, "what's the industry's position, what's the union position...what does the money want?" Tr. VIII:24-25. Citizens appreciate all too well the situation. Sen. Ready testified that people think "'the big

money controls everybody in Montpelier....' They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." Tr. IX:119.

As Lt. Governor, Smith observed first-hand how the fear of losing several contributors at once has the potential to sway legislative action. Tr. VIII:39-41. He was called upon to cast the tie-breaking vote concerning whether optometrists, as well as ophthalmologists, would be allowed to administer eye drops. "There were lobbyists and individual doctors...all over the statehouse." Tr. VIII:41. It became clear to him that these groups were banking on the power they could obtain through campaign contributions: "the merits of the case were, if you will, infused...by the financial power of the groups and the individuals who were contesting the bill." Tr. VIII:42.

The record is replete with examples of groups asserting their financial strength to gain access to officials and exert undue influence on governmental outcomes. Democratic Party leaders reminded Legislators that they risked being "shut off in the next election cycle from any contributions" from pharmaceutical interests unless they voted consistent with the industry's views. Tr. VII:66; Ex. V:1763-64 (summary of pharmaceutical contributions). Likewise, the Senate President refused to support a bill requiring labeling of genetically-engineered food because he feared loss of the financial support of food manufacturers. Tr. VII:67-71. He stated: "We've already lost the drug money, and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." Tr. VII:70; P.A. 131a; *see also* Trs. VIII:47-48 (NRA use of fundraising ability to attempt to influence officials' position); IX:104-07, 110-11, 175; Exs. II:425-26; V:1766 (all noting beverage industry contributions as significant in preventing expansion of bottle redemption bill); V:55-56 (tobacco industry contributions handed out after defeat of tobacco bill). When a candidate does not know how much her opponent may raise, it is much harder to turn down such compromising donations.

Similarly, several trial witnesses described contributions by slate quarries to members of a legislative study panel that was considering a regulatory exemption for the quarries. Contrary to the usual practice, the Senate President appointed panelists who were not members of the Natural Resources Committee -- the committee that had jurisdiction over this topic. The President and members of the study committee received contributions of $500 each from the slate industry. Tr. IX:92-94; Ex. V:1765. When the quarries were exempted from regulation, neighbors perceived that the money and power of the quarries had drowned out citizens' voices. Trs. IX:103-04 ("they felt powerless"); VII:63-65; Exs. III:785 ("hard to top this [incident] for blindness to appearances and propriety"); III:787.

Even if the preferential access and influence of special interests results in no tangible benefits to the contributors, "it certainly [gives] the 'appearance of such influence.'" *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado II*)). And those perceptions directly undermine the public's faith in government. As Sen. Rivers testified:

> Sometimes I have difficulty getting people to agree to register to vote, and they say, you know, in the end, money decides everything. My vote doesn't matter.

Tr. VII:65; *see* Tr. IX:119 ("People don't believe their vote counts.").[12]

Indeed, witnesses for both sides "acknowledged the deterioration of public confidence" in Vermont. P.A. 36a-37a; *see* Trs. IX:57-58 (voters believe that high spending campaigns reflect candidates running for special interests); IX:129-30

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[12] Encouraging citizens to vote is "an essential state objective: for the constitutional order must be preserved by a strong, participatory democratic process." *California Democratic Party v. Jones*, 530 U.S 567, 587 (2000)(Kennedy, J., concurring).

(with unlimited campaign spending, average citizens do not feel like "players"); V:114-15 (constituents feel powerless); X:186-87; Exs. II:482-83 (money is distancing people from government); III:847-48 (survey showed Vermonters extremely concerned about influence of special interests, as compared with ordinary citizens); Trs. V:55-56; VII:62-63; X:180; Ex. III:806-09 (all noting perception of impropriety from tobacco industry donations).

The access and influence of special interests described above is corrupt "because it is bought." P.A. 134a. Plaintiffs' suggestion that it does not fall within the Court's definition of "corruption" is totally at odds with precedent. *McConnell* judged the concern that officials would make decisions based "not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions" to be "[j]ust as troubling...as classic *quid pro quo* corruption." 540 U.S. at 153. Even if those decisions "occur only occasionally, the potential for such undue influence is manifest." *Id.*

Corruption thus extends beyond clumsy, money-for-vote chicanery, to "more subtle yet equally dispiriting forms of corruption," *id.*, that threaten the integrity of the political process. Such corruption includes the use of donations to "gain access to high government officials," *id.* at 150, and extends to "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *see McConnell*, 540 U.S. at 150; *Colorado II*, 533 U.S. at 441 (corruption includes "undue influence on an officeholder's judgment"); *Buckley*, 424 U.S. at 27, 29-30, 45 & 67 (corruption concerns "improper influence" or "groups desiring to buy influence" or "post-election special favors that may be given in return" for generous support).

The public's perception of such political corruption is also of great constitutional concern. *Shrink*, 528 U.S. at 388-89 (citing *Buckley*, 424 U.S. at 26 and *Letter Carriers*, 413 U.S. at

565). As the Court stated in *FEC v. Nat'l Right to Work Comm.* (*"NRWC"*), the suggestion of such corruption "directly implicate[s] the integrity of our electoral process." 459 U.S. 197, 208 (1982)(quotation omitted). Since Act 64's spending limits directly counter political corruption and its appearance, they further interests of the highest order.

C. Vermont's Spending Limits Protect The Time Of Officials And Candidates

Act 64's spending limits are also supported by a second compelling justification: protecting candidates' and officials' time from the demands of excessive fundraising. Both lower courts correctly determined that the need for unlimited campaign money often forces officials away from their governmental duties and pressures them and all candidates to allot their limited available time to donors rather than constituents. This not only results in preferential access to monied interests and less effective governing, it also limits the scope of the views and perspectives heard by officials and candidates. J.A. 20-21 (Findings (a)(1), (a)(4), (a)(8)).

Members of this Court have noted the compelling nature of the interest in freeing officeholders and candidates from the stranglehold of fundraising. While *Buckley* merely mentioned that interest in connection with upholding the public financing portion of the Federal Elections Campaign Act ("FECA"), 424 U.S. at 96, Justice Kennedy has suggested the possibility of "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting); *see Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996)(Stevens & Ginsburg, JJ., dissenting) ("*Colorado I*").[13]

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[13] Courts of appeals have also found the time protection interest to be compelling. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

The vital governmental interests in diminishing distractions to officeholders, enabling candidates to engage with voters in mutual communication, and encouraging officials to be mindful of and responsive to the broad array of citizens -- not to a select few -- are enshrined in the Vermont Constitution itself. It declares that all power is "originally inherent in and co[n]sequently derived from the people, therefore, all officers of government...are their trustees and servants; and at all times, in a legal way, accountable to them." Vt. Const. ch. I, art. 6. It further provides that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community...." Vt. Const. ch. I, art. 7. The critical importance of such concerns cannot validly be challenged.

The legislative and district court records here provide ample evidence supporting the interest in time protection. Given the desire for increasing amounts of campaign funds, officials are continually forced to choose between attending to their duties and shoring up financial support. All too often, the official duties lose out. As the Senate President testified to one committee:

> I can't tell you how many times I'm walking down this hall and someone grabs me [ ] and says, could you meet with so and so, and I know that preferably my answer would be no, I have other work to do, but I also have to think about [elections in] '98.

Ex. I:291; *see* J.A. 21-22 (Finding (a)(11)); Exs. I:92 (law will allow candidates "to concentrate more on issues rather than raising public money"); I:326, 358 (similar); III:793 ("distraction of fundraising" caused Governor to focus on large fundraisers).

Fearing their opponents' war chests and concerned about being outspent, Trs. V:51; VIII:57-58; Ex. I:233, candidates and

officials typically grant monied interests excessive portions of their limited time. As a veteran official stated, the further one progresses politically, the more time one spends raising money and paying attention to big money contributors. Tr.VIII:19, 23-24; *see* Ex. V:1845 (more likely to spend time with large funding sources). If officials have only an hour to respond to telephone calls, donors will get their calls returned. Trs. V:29-30; IX:166-67; Ex. III:781. In short, the unbridled need for campaign cash compels candidates and officials to afford greater and greater amounts of their time to their funding sources. J.A. 20 (Finding (a)(2)).

When officials and candidates spend time "talking to large contributors, they are not talking to others." Trs. IX:194; *see* IX:128-29 (fundraising keeps officials "locked away" and not "out with the public"). The information and perspectives they hear on issues are primarily those of the narrow interests that provide them monetary support. Consequently, concerns of the wealthy "dominate[ ] the political process to the exclusion of the voices and ideals and aspirations of poor and working class and middle class people." Tr. V:170; *see* Tr. V:116 (officials develop relations with those who have money not ideas); Tr. VII:59-60 (large sponsors of senate fundraisers include major drug companies); Tr. IX:113, 116-17. This directly affects candidates' and officials' views on the issues and distorts the representative nature of democracy.

Under a system of unlimited spending, the important views of Vermonters whose money must go to mortgage payments and heating bills often go unheard. Ex. V:1845-46; Tr. IX:104; *see also* Tr. V:130, 143; Ex. V:1838 (all noting value of hearing views of constituents). The "collective discussion and debate" among elected officials and citizens that the Framers viewed as a cornerstone of our republican form of government is thereby tilted in favor of monied interests. Cass Sunstein, *The Republican Civic Tradition:*

Beyond the Republican Revival, 97 Yale L.J. 1539, 1549, 1576-78 (1988). This makes officeholders accountable to money, not to the citizens of Vermont.

By releasing candidates from the pressure to raise limitless sums, Act 64 restores balance to that "discussion and debate," permits officials to attend to the people's duties, and "improve[s] the health of the democratic system." P.A. 59a; *see* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1298 (1994)(reducing fundraising time enhances "quality of representation"). Such interests are undoubtedly compelling.

D. Vermont's Spending Limits Do Not Favor Incumbents

Plaintiffs' contention that Vermont's spending caps unfairly discriminate against challengers and non-traditional candidates is meritless. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S. at 31, 33; *Shrink*, 528 U.S. at 389 n.4 (rejecting notion that contribution limits applicable to all favor incumbents).[14] No proof of intentional discrimination exists here. Just the opposite.

Many people supported Act 64 because they believed it would increase the number and diversity of challengers. Ex. II:649; Tr. VII:148; *see* Exs. I:376-77 (Governor's Commission on Women urged campaign reform, noting that then-existing system "favors the wealthy, the incumbent and the white males"); I:92 (Act 64 permits greater accountability of incumbents and improves challengers' chances); Tr. VII:86 (Act 64 does not disadvantage non-traditional candidates).

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[14] *Shrink* described this as an equal protection argument. Plaintiffs' amended complaints allege no such claim.

Most importantly, it is incumbents who benefited most from the system in place prior to Act 64. Tr. X:19 ("old law was the best incumbency protection money could buy"); *see* Ex. III:1057-58 (noting high re-election rate of incumbents). Incumbents typically have greater access to large, monied interests, can generate large war chests that dissuade potential candidates from mounting challenges, and can outspend opponents. Trs. IV:12; VI:94-95; IX:127, 231; X:33; *see* 424 U.S. at 32. As a result of those advantages, incumbents were often uncontested in Vermont. Tr. X:33; Ex. V:1694. Spending caps work directly *against* incumbents by diminishing such impediments to competition. Trs. VII:79; IX:144-45.

Contrary to Plaintiffs' assertions, challengers need not outspend incumbents to win. Evidence below showed that challengers can be competitive so long as they are not greatly outspent by incumbents. Tr. X:82-84. Since Act 64 specifically grants non-incumbents the ability to outspend incumbents, challengers are given a significant advantage. 17 V.S.A. §2805a(c)(P.A. 7a); P.A. 151a. Plaintiffs submitted no evidence supporting a claim of invidious discrimination against non-incumbents; their arguments were and still are entirely "speculative." P.A. 60a, 151a-52a.

E. Vermont's Spending Limits Are Narrowly Tailored

The Second Circuit's complex, multi-step tailoring analysis and its remand to examine alternatives and possibly fine tune the spending levels are unnecessary. The record here fully supports the conclusion that Act 64's spending limits are a narrowly tailored means of protecting the integrity of Vermont's electoral system.[15]

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[15] The dissent below and the Randall Plaintiffs, Br. at 4-5, exaggerate the scope of the term "expenditure" to support their assertions. 17 V.S.A. §2801(3)(P.A. 1a). Since Plaintiffs did not challenge that definition as overbroad or vague in their complaints, the lower courts did not have the benefit of the State's authoritative construction of the

Since 1916, Vermont has sought effective methods for deterring actual and apparent political corruption. P.A. 26a-27a. Disclosure laws, contribution limits and voluntary spending caps did not, on their own or in concert, totally ameliorate those dangers. Vermont has, thus, examined and employed feasible alternatives to spending limits and found them wanting.[16] J.A. 20-21 (Findings (a)(2), (a)(3), (a)(9)).

Likewise, the Second Circuit's remand to determine whether higher spending limits would be as effective as those of Act 64 is unworkable because it assumes that there is a single dollar amount that will satisfy the Constitution. It leads to the hopeless task of trying to decide whether a limit $1,000 higher would be as effective as the chosen limits at combating corruption and its perception and at protecting candidates' and officials' time. P.A. 162a. Such meticulousness has not been demanded by this Court to satisfy narrow tailoring and would amount to a virtual "straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecom.*

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term. While Plaintiffs would have the Court believe that "expenditure" might include virtually all conduct, the State has not construed it so expansively. For example, expenses of litigating issues under Section 2809(e) are not expenditures, for they are not (as the statute requires) "paid...for the purpose of influencing an election." Similarly, the State does not interpret traditional volunteer activity to fall within the definition of expenditure.

[16] Some of the alternatives suggested by Plaintiffs and their *amici* already exist in Vermont, yet corruption and time concerns remain. *See, e.g.,* 2 V.S.A. §266 (prohibition on accepting campaign contributions from lobbyists during session); and House and Senate Rules, Part III, Rule 10, *at* http://www.leg.state.vt.us/misc/rules2.htm (members are to be present for all sessions and committee meetings). Similarly, VRSC's suggestion, Br. at 43-44, that officials hire staff to perform their duties while they fundraise, only guarantees that elected officials will spend even more time neglecting their duties. It would also undermine the citizen legislature that Vermont sought to preserve through Act 64, Ex. I:294, and would do nothing to deter corruption.

Consortium v. FCC, 518 U.S. 727, 741 (1996); *see Burson*, 504 U.S. at 209 (rejecting notion that state must "perfectly tailor[ ]" size of picket-free zone); *see also McConnell*, 540 U.S. at 208 (tailoring should permit government to address problem "most acute to the legislative mind").

While the Court has not fully defined the scope of tailoring in the expenditure limits context, Act 64's limits are "precisely targeted to eliminate" the evils that justified the law. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). Further, as the record convincingly establishes, they permit lively and effective campaigning at all levels. P.A. 43a-44a, 152a-57a. As such, they are sufficiently tailored.[17]

II. Alternative Constitutional Analyses Support Vermont's Spending Limits

The State believes that Act 64's campaign expenditure limits survive the exacting scrutiny set out in *Buckley*. If not, then the Court should revisit *Buckley* and consider alternative constitutional approaches to spending limits. Specifically, where two or more constitutional interests are in conflict, a long line of this Court's decisions has counseled in favor of balancing those concerns to determine which should take precedence under the circumstances presented. *See Shrink*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring)(collecting cases); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991)(balancing fair trial rights against First Amendment interests); *Republican Party v. White*, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring)(First Amendment right can give way to avoid "impairment of some other constitutional right"). Under such an analysis, the expenditure caps of Act 64 are constitutional.[18]

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[17] The State adopts the full discussion of tailoring contained in the brief of Respondents VPIRG, *et al.*

[18] While such balancing may be performed consistent with *Buckley*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring), it also stands alone as a basis for upholding spending restrictions.

Spending limits advance constitutional concerns that go to the very structure of government. As argued above, states have a constitutional imperative to ensure the integrity of their electoral processes. *McConnell*, 540 U.S. at 137. Where, as in this case, the Legislature has evidence that unfettered spending has corrupted its governmental system, it must be able to take reasonable protective action. In *Burson v. Freeman*, for example, the Court balanced the harm to the electoral process presented by the appearance of placards at polling places against the First Amendment right of persons to express their views through such signs. The Court determined that the minimal intrusion on the latter's interest was more than justified by the necessity of ensuring the integrity of the electoral process. 504 U.S. at 198-211; *see Letter Carriers*, 413 U.S. at 565-67 (upholding Hatch Act because citizens must have faith that government actors are unbiased); *Elrod v. Burns*, 427 U.S. 347, 368 (1976) ("Preservation of the democratic process is certainly an interest protection of which may in some circumstances justify limitations on First Amendment freedoms.") (plurality opinion).

Indeed, even before the First Amendment was drafted, the Constitution assured to all citizens a republican form of government. U.S. Const. art. I; art. IV, §4. The United States and Vermont fulfill those guarantees by locating ultimate power with the citizens who then elect officials to represent their interests.[19] *See Largess v. SJC*, 373 F.3d 219, 227 (1st Cir. 2004); Federalist Nos. 37 & 39 (under republican government all power derived from the people). As this record shows, however, the race for funds sometimes pressures officials to make decisions based on their own sense of obligation to past funding sources or their own need for future campaign monies.

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[19] The Framers believed that such "representation and jury trial were dual securities for the first great class of personal rights." Jack Rakove, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996).

McConnell, 540 U.S. at 153. Such a result undermines a core component of democracy and creates a government that is not "open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The admittedly weighty First Amendment interests of candidates do not surpass the constitutional interests described above. Candidates choose to enter politics and ought to abide by appropriate rules and regulations established to protect the fairness and integrity of that system. Act 64 imposes a reasonable limitation on the amount a candidate may spend in that setting.[20] Since effective and vibrant campaigns can be run under Act 64's limits, any burden on candidate speech is not severe.[21] Balanced against the significant constitutional interests directly furthered by spending limits, those restrictions are more than justified. As Learned Hand stated in another context, the "gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (2nd Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Constitutional restraints must be flexible enough to allow states to serve as "laboratories" to experiment with balancing such concerns, as Vermont has done with Act 64. *See, e.g., Whalen v. Roe*, 429

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[20] Prior to *Buckley*, numerous states and localities had long functioned with spending limits. Internationally, many democracies, including Canada and England, also adhere to such limits. Roland Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, 147 (1996).

[21] In fact, Act 64's spending limits will likely *enhance* First Amendment interests by improving candidate-voter interaction; increasing issue-based campaigns; fostering citizen interest in campaigns; and boosting the number of competitive races. *See Colorado I*, 518 U.S. at 649-50 (Stevens & Ginsburg, JJ., dissenting).

U.S. 589, 597 (1977); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995)(Kennedy, J., concurring); J.A. 109.[22]

III. Vermont's Limits On Political Contributions Are Constitutional

Vermont's contribution limits are in keeping with recent and familiar Court precedent. In an unbroken string of decisions, this Court has consistently upheld the validity of laws limiting contributions to candidates because they directly serve the vital interests of deterring corruption and the appearance of corruption in politics. *See McConnell*, 540 U.S. at 137-38 & n.40 (collecting cases and noting strong *stare decisis* implications from the Court's contribution limits jurisprudence). Because of the "limited burdens they impose on First Amendment freedoms," *id.* at 136, contribution limits are not subject to full exacting scrutiny review, and legislative determinations concerning the need for particular limits are entitled to substantial deference. *Id.* at 137; *Shrink*, 528 U.S. at 386-88; 424 U.S. at 21. Even a contribution limit "involving 'significant interference' with associational rights, could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tun[ed].'" *Shrink*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 134-37.

The record here easily satisfies that standard and shows that Act 64's limits directly advance critical interests and permit fully effective campaigning.

A. Vermont's Contribution Limits Deter Actual And Perceived Corruption

1. While the instant record contains abundant proof that, even with its prior contribution caps, campaign donations had

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[22] The State adopts those portions of the brief of Respondents VPIRG, *et al.*, suggesting alternative compelling interests and constitutional approaches supporting spending limits.

fostered the reality and appearance of corruption in Vermont, the quantum of proof necessary to validate such justifications is not exacting. The *Shrink* Court flatly rejected a line of cases from the Eighth Circuit, still cited by the Plaintiffs, *see, e.g.*, VRSC Br. at 12, that had required exhaustive proof of actual corruption or its perception before contribution limits would be upheld. This Court ruled, instead, that the findings made in the course of the *Buckley* litigation are themselves sufficient to establish that legislative concerns about corruption and the appearance of corruption stemming from large contributions are not "'illusory.'" *Shrink*, 528 U.S. at 391 (quoting *Buckley*, 424 U.S. at 27); *see McConnell*, 540 U.S. at 117 (noting congressional statements bemoaning "the pernicious influence of large campaign contributions"). The Court concluded that there "is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Shrink*, 528 U.S. at 395; *see NRWC*, 459 U.S. at 210 (court has no basis to "second guess" congressional judgments "where corruption is the evil feared").

Just so here. Following *Shrink*, it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded. *Shrink*, 528 U.S. 391 & n.5 (collecting cases noting link between contributions and corruption).

Plaintiffs' further contention that the Constitution requires exhaustive and Vermont-centered instances of corruption linked directly to specific contribution levels, *see* VRSC Br. at 10-12, is belied by this Court's precedents. *Buckley*, *Shrink* and *McConnell* did not demand proof that there had been corruption or the fear of corruption "just above" the specific levels of the contribution limits being reviewed. *Buckley* rejected the very argument echoed by Plaintiffs here that only much higher contributions would tempt politicians to risk their careers. 424 U.S. at 30; VRSC Br. at 11-12. In its place, the Court accepted

evidence that, as a general matter, large contributions had either corrupted the political process or created a public impression of such corruption. Since contribution limits directly address those concerns, they were rightly found to further significant governmental interests.

More importantly, Plaintiffs' approach would require states to suffer injury before taking steps to protect their political processes and would impose an impossible evidentiary burden. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Under Plaintiffs' misguided view, in the absence of actual proof of corruption at a specific level of contribution, a state could not act prophylactically to guard against campaign abuses. That is not the law. It is "*the potential for* such influence that demands regulation." *NRWC*, 459 U.S. at 210 (emphasis added); *Shrink*, 528 U.S. at 393-94 nn.5-6. Moreover, a contrary rule would subject states to "endless court battles over sufficiency of the evidence" of corruption. *Munro*, 479 U.S. at 195 (quotation omitted).[23]

2. While Vermont might have justifiably passed Act 64 solely as a preventative measure,[24] unfortunately, it did not. The legislative history of Act 64 and the record before the district court provide significant examples of corruption and the appearance of corruption stemming from contributions in Vermont -- all of which arose despite Vermont's prior, $2,000, contribution limits.[25] Such evidence more than meets any

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[23] Plaintiffs' mistaken approach would also force the State to justify the particular amounts of its contribution limits under both prongs of the *Buckley/Shrink* framework. Instead, contribution levels are rightly examined in the tailoring portion of that analysis.

[24] Act 64 was designed, in part, to safeguard Vermont from the types of scandals that had occurred elsewhere. Exs. I:197, 272, 291-92, 349-50, 364; II:483-84.

[25] With the household median income in Vermont at $32,358 in 1996, this amounted to more than two-thirds of a household's monthly gross income. Ex. V:1740-41.

requirement that the State adduce Vermont-specific evidence of corruption or its appearance. Contrary to Plaintiffs' arguments, Randall Br. at 42, VRSC Br. at 12-13, in terms of both quality and quantity, the evidence in this case far surpasses that relied upon in *Shrink* to uphold Missouri's contribution limits. 528 U.S. at 393-94.

The Findings and the exhaustive evidence presented to the Legislature provide strong proof of corruption and the appearance of corruption in Vermont politics. The Legislature found that some candidates and officials "respond and give access to contributors who make large contributions in preference to those who make small or no contributions;" that large contributions "reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens;" and that reducing large contributions is necessary to fulfill the guarantee of the Vermont Constitution that "all elections ought to be free and without corruption." J.A. 20-22 (Findings (a)(2), (a)(9) & (b)). These Findings were fully supported by the legislative record. *See supra* Statement of the Case, Section I.B; P.A. 52a.

The documentary and testimonial evidence credited at trial by the district court confirmed the Legislature's concerns. After interrogating many witnesses on its own and closely examining the evidence, the court found that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence" and that large contributions have negatively impacted the public's confidence in the system. P.A. 37a-38a.

The record before the court revealed a political system where donors receive, or were perceived to receive, unequal access to and undue influence over the legislative process and officials solely as a result of their campaign contributions. Sen. Rivers admitted that she gave special consideration to a tax exemption request because the person asking was a large donor.

Tr. VII:2-74. Other officials were equally frank. *See* Tr. IX:167 (Ready: "Not everybody in my district do I have lunch with or...return a call from the floor of the senate before a vote.... [or] meet with on a Saturday morning.... [or] spend half of my son's soccer game talking to about their business. There is definitely different levels of access to elected officials."); Tr. VII:72 (Rivers: "[W]hen I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent."); Ex. V:1845 (Fiorillo: the larger the contribution, the more likely the official will spend time with the donor).

Indeed, access and influence are the prices customarily paid in return for contributions. Tr. VII:72-74 ("typical" for Vermont officials to give special consideration to requests and views of large contributors). As former Secretary of State Don Hooper explained, donors "expect access and consideration.... So in essence at a minimum [a contribution] buys access. On the worst days I suppose it buys influence." Tr. V:58-59; *see* Tr. IX:195-96 (Governor granted meeting to large, corporate contributor while repeatedly denying meeting on same subject to a group of Vermont farmers).

Donors appreciate and wield this financial clout. State Treasurer Paul Ruse was forced to forgo a re-election bid amidst public outcry over his acceptance of significant contributions from financial firms that "may want favors in return." Ex. III:803-04; *see* Ex. III:795-97. Rep. Kitzmiller stated that Ruse's conduct "certainly gave the impression that there was *quid pro quo* of money given to a candidate and business done by the officeholder for the person giving the money." Tr. X:161-62; *see* Trs. IX:92-93, 103-04; Exs. III:785-87; V:1765; *see also* Tr. X:184-85 (contribution while bill pending believed to be connected to vote).

Officials often take full advantage of this culture as well, creating what is all too often a pay-to-play system:

> Q: [D]o the lobbyists have any understanding of the value of attending a fundraiser for a candidate?
>
> A: It's almost mandatory in some -- I am trying to think of what the right thing is. For example, when Speaker Wright started the speaker's soiree, you had needed -- I think if you were a lobbyist during that period in the legislature and you wanted your bill or your hopes that some other bill would be devastated, if you were serious about that, you needed to attend.

Tr. V:30-31; *see* Ex. II:511 (officials aggressively seek monies from lobbyists).

As the district court correctly observed, the citizens' perception of such a regime is unmistakable: it raises an obvious appearance of corruption that impacts public confidence in the integrity of government. P.A. 36a-38a; *see* Trs. IV:183-84; IX:94-95, 108-09, 116-17, 168-69. Incidents like those above, "increase the cynicism on the part of the public...and make it more difficult to convince people that the democracy is alive and well in this country." Tr. VII:65; *see* Tr. V:54 (perceptions of Ruse incident). Even many of Plaintiffs' witnesses agreed. P.A. 36a-37a.[26]

Expert testimony adduced at trial provided additional confirmation of the impact contributions have upon the conduct of officials. The studies and testimony of Professor Thomas Stratmann showed that "large contributions create the appearance of corruption to the public and affect legislators' voting behavior." P.A. 38a; Tr. VII:198; Ex. III:1064. Dr. John Lott, a VRSC expert, admitted that donors will often do what it

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[26] Indeed, in 1998, nearly three quarters of Vermonters polled believed that wealthy individuals and large corporations had too much influence in politics and ordinary voters did not have enough. Ex. III:847-48; *see Shrink*, 528 U.S. at 394 (relying on survey).

takes to obtain preferential government treatment. The "more favors government has to give out, the more resources that people will spend to obtain those favors." P.A. 38a; Tr. III:154-55 202; Ex. VI:2266.

As the Second Circuit rightly concluded, the evidence before the Vermont Legislature and the district court was more than sufficient to justify the need for Act 64's contribution limitations. P.A. 125a.

B. Vermont's Contribution Limits Are Closely Drawn

The great weight of the evidence convincingly establishes that Act 64's contribution limits are appropriately geared to the Vermont political landscape. Citing primarily evidence considered and rejected at trial, Plaintiffs ask this Court to overturn the findings of the Vermont Legislature, and the conclusions of the district court and of the unanimous court of appeals, all of which determined that Act 64's contribution limits were set at levels permissible under the First Amendment. Those judgments should be affirmed.

This Court has made plain that legislative determinations as to the precise dollar amounts for contribution levels are entitled to "significant" deference and should not be "'fine tun[ed]'" by courts. *Shrink*, 528 U.S. at 388, 397 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 137 (less rigorous review takes account of legislative expertise in political campaigns). A "court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30 (internal quotation omitted).[27] And *Shrink* made

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[27] Plaintiffs' argument that no deference should be due to Act 64's contribution limits because they were enacted for the "impermissible purpose" of reducing spending is unsupportable. While the VRSC Plaintiffs cite legislative statements concerning an unenacted version of H.28, which indicate that one intent of that bill was to reduce campaign spending, they fail to note that the bill contained public financing provisions with express spending caps. Ex. I:1, 9. Nor can the statements of one or two legislators concerning a bill that was

clear that the $1,000 limitation upheld in *Buckley* was not "a constitutional minimum below which legislatures could not regulate." 528 U.S. at 397. Appropriate limits will vary based upon the jurisdiction involved.

Following that analysis, this Court has held that contribution limits should be deemed valid unless they are set so low that they prevent candidates from amassing "the resources necessary for effective advocacy" and are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* (citing *Buckley*, 424 U.S. at 21). The limits of Act 64 are not so draconian.

Based upon considerable evidence, the Legislature and both lower courts determined that the limits of $200, $300, and $400 were directed at donations considered "suspiciously large" by most Vermonters. P.A. 59a; J.A. 20 (Finding (a)(3)); Ex. II:664-80 (1995 poll indicated nearly 70% of Vermonters believed a $100 contribution limit would make politicians more responsive to the public). Such evidence came from witnesses offered by both sides. P.A. 59a; *see also* Trs. IX:225-26; VIII:23 (anything over $100 in Vermont is a significant contribution). As one official stated: "$250 to a working Vermonter is a lot of money. You know, it's the car payment. It's the grocery bill for two weeks ... or three weeks." Tr. IX:117.

Correspondingly, small donations are meaningful in Vermont because nearly every contribution is considered to be a "strong act[ ] of political support." P.A. 42a. In fact, the Republican candidate for Governor in 1996 and 1998 personally sent thank you notes to all donors who gave $5 or more. *Id.* Against such a backdrop, the limits of Act 64 are

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amended extensively establish an impermissible legislative purpose or invalidate an otherwise constitutional law. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

certainly a far cry from being "pointless," *Shrink* 528 U.S. at 397, or "laughably low," P.A. 344a.

Historical giving patterns in Vermont persuasively establish that Act 64 is directed solely at significant contributions and will impact only a modest portion of contributions and candidates. Professor Gierzynski's analysis of the 1994, 1996 and 1998 election cycles confirmed that the limitations of Act 64 would have affected fewer than 10% of the overall contributions received in those elections. P.A. 40a; J.A. 65. Specifically, the limits would have affected only 3.5%, 5.4% and 11.9% of the House contributions, only 6%, 4.7% and 17.2% of the Senate contributions,[28] and only 9.5%, 9.9% and 7.8% of the contributions for statewide elections during those years. J.A. 65.

Plaintiffs' attempt to discount this minimal impact by focusing on those few candidates who have relied greatly upon large contributions is unavailing. *Buckley* and *Shrink* do not and cannot stand for the proposition that contribution limits must be geared to the candidates who have chosen to rely upon a few well-heeled contributors. Indeed, one purpose of contribution limits is to diminish the corruption and appearance

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[28] The great majority (73.6% and greater) of legislative candidates would have had to make no changes to their fundraising as they received no contributions in excess of Act 64's caps. J.A. 65, 76. Likewise, the percent of revenue lost as a result of Act 64 in those three cycles would have been only 6.5%, 5.3% and 3.2% for House candidates and 18.2%, 10.8%, and 10.1% for Senate candidates. J.A. 72, 74. While the percentage of revenue lost was greater for some statewide candidates, such high percentages often corresponded to only small amounts of money. Tr. VI:21, 26; *see* J.A. 67 (Milne); J.A. 69 (Milne; Amestoy); J.A. 71 (Flanagan). Moreover, in a number of cases, candidates did not even spend the full amount of the monies they had raised. J.A. 69 & 85 (Dean); J.A. 71 & 86 (Dean; Snelling). In any event, evidence showed that lost revenues could be replaced through alternative campaign methods. P.A. 59a; Trs. V:85-86; VII:101; *see* 424 U.S. at 22.

of corruption that such reliance fosters. *Shrink*, 528 U.S. at 390. Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates. *Daggett*, 205 F.3d at 460.

For similar reasons, Plaintiffs take nothing from their reliance on the flawed report of expert Clark Benson. Benson studied only a single election year, 1998, which happened to show increases over the 1994 and 1996 cycles. Professor Gierzynski testified that drawing conclusions from only one year can be misleading, Tr. VI:73, and Benson agreed that he would have preferred to study additional years, Tr. III:90. Benson's data also excluded candidates who spent less than $500. Ex. III:1020-24. This resulted in his failure to take account of 136 House candidates and 25 Senate candidates, thereby exaggerating the impact of Act 64's limits. *Id.* In light of such deficiencies, the district court implicitly rejected the credibility of Benson and his report in favor of the opinions of Professor Gierzynski. P.A. 39a-40a.

Most importantly, as the district court and the Second Circuit correctly ruled, Act 64's contribution limits will permit candidates to amass sufficient resources to mount effective campaigns. Although some -- but not all -- of Plaintiffs' witnesses offered countervailing testimony, the district court weighed all the proof offered and determined that "the more credible evidence" shows that effective campaigns can be run under Act 64's limits.[29] P.A. 40a. While Plaintiffs continue to cite the contrary evidence they submitted below, the district court's credibility determinations are entitled to deference even in cases concerning the First Amendment. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

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[29] Nearly all witnesses agreed that an effective campaign does not need to be a winning campaign. P.A. 40a n.19; Trs. I:95; II:22; Randall Br. 8-9 (conceding same).

The district court's conclusion was well grounded upon testimony from present and former elected officials, candidates and campaign managers. They provided compelling proof that Act 64's limits would permit effective campaigns at the House, Senate and statewide levels. P.A. 41 n.20; *see* Trs. I:57 (Snelling); IV:187-88 (Howard); V:22, 86 (Hooper); V:141 (Friedman); VII:15-18 (Young); VIII:53-54 (Smith); IX:45-57, 61-62 (Bristol); IX:136 (Ready); X:180-82, 185-186 (Kitzmiller); Exs. IV:1384-85 (Brownell); V:1824 (Fiorillo).[30]

The 1999 race for Mayor of Burlington, Vermont's most populous city, is a telling case in point. In that campaign, Kurt Wright challenged Peter Clavelle. Working under a $200 contribution limit, both candidates "were able to amass sufficient resources to run effective campaigns." P.A. 41a. Clavelle raised almost $39,000, which is more than he had raised in three of four campaigns prior to Act 64. Wright met his fundraising goal of $19,000 and by his own admission ran a competitive campaign, was able to get his message out to a substantial portion of the electorate, and received 40% of the vote. Ex. VIII:2758-67, 3051, 3053, 3071, 3075-76.

The district court rightly employed those figures to support Act 64's contribution limits for state Senate. Campaigns for Senate in Chittenden County, where Burlington is located, had historically averaged $10,000, with the highest spending campaign from 1994-1998 being $34,177. Exs. III:990; IV:1306. Given the amounts raised by Clavelle and Wright, the higher, $300, contribution cap for Senate, and the greater

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[30] Plaintiffs' contention that Act 64 should be invalidated because its limits apply per cycle rather than per election, also misses the mark. The propriety of contribution caps turns principally on their ability to permit effective campaigns, whether for primary or general elections. Vermont's primary and general elections are held only two months apart, some of the closest in the country. Tr. VI:85-86; VIII:71-72. The district court understood this and held that Act 64's limits permitted fully effective campaigns.

geographic area, the district court reasonably determined that the mayoral fundraising provided strong evidence that Act 64's contribution limit for Senate would permit effective advocacy. P.A. 58a-59a.

The VRSC Plaintiffs mistakenly rely on the contention that Wright might have raised more money in the absence of Act 64's limits. VRSC Br. at 18. Even if factually true, such evidence simply provides no basis to invalidate the law. *Shrink*, 528 U.S. at 396; *id.* at 404 (Breyer & Ginsburg, JJ., concurring) (campaign finance laws will always have an adverse impact on some candidates).[31] The evidence shows Wright's campaign was competitive and effective. No more is required.

Given the differing populations and scales, Vermont's caps also compare favorably with the per-election limitations of a number of states, including those from Missouri, which were upheld following remand in *Shrink*. *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842-43 (8th Cir. 2000)($525 for Senate or any office where the electoral district population is 100,000 or more; $275 for House or any office where the district population is under 100,000). In fact, when Vermont's statewide contribution limits are examined in relation to the size of the constituency -- and thus the size of the campaign needed to reach those voters -- Act 64's limits are more generous than those upheld for Missouri. J.A. 55 (ratio of .00068 versus .00040); P.A. 57a-58a; *see also Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093-96 (9th Cir. 2003)($400 for Governor and Lt. Governor, $200 for other statewide office, and $100 for all other offices); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 458-62 (1st Cir. 2000)($250 for Maine's House and Senate); *Florida Right to Life, Inc. v. Mortham*, No.6:98-770, 2000 WL

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[31] If that were the legal standard, federal candidates who might have raised additional monies from foreign citizens, corporations or labor unions, could use that fact to argue against FECA's prohibition of such contributions. *NRWC*, 459 U.S. at 210.

33733256 (M.D. Fla. Mar. 20, 2000)($500 limit in populous Florida).

Even if Act 64's limits require candidates "to raise funds from a greater number of persons" that does not render the law unconstitutional. 424 U.S. at 21-22. If more small donors are encouraged to give, that can hardly be adverse to First Amendment principles.[32] P.A. 59a; Tr: V:119.

IV. Vermont's Party Contribution Limits Are Constitutional

Plaintiffs' challenge to Act 64's limits on the amounts political parties can contribute to candidates is legally and factually flawed.[33] Consistent with *McConnell* and *Colorado II*, Act 64's party contribution limit is targeted to deter party corruption and its appearance and to avoid evasion of the law's other limits. It also permits parties to engage in energetic and effective political advocacy.

Despite Plaintiffs' contrary assertions, VRSC Br. 26, this Court has explicitly recognized that the money flowing into and out of parties has the potential to corrupt candidates and officials. *Colorado II* emphasized that parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 451-52. Accordingly, the Court upheld FECA's limits on coordinated spending by parties as

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[32] A salutary effect of Act 64's limits may be to increase the number of overall donors, as citizens who had felt left out of the process are reconnected. *See* Trs. V:119, 137; VIII:63, 95; IX:137, 241. For example, Rep. Gordon Bristol testified that his mother made her first contribution in 2000 because the contribution finally mattered. Tr. IX:58-59.

[33] Plaintiffs contend only that Act 64's contribution limits are too low, not that parties should be exempt from contribution limits altogether. VRSC Br. 26; Randall Br. 49-50. The latter position is foreclosed by *Colorado II*, which upheld FECA's limits on coordinated party expenditures. 533 U.S. at 464-65. Nor do they contend that the limits for political committees should be higher than those for individuals.

necessary to prevent individuals and PACs from circumventing the law's individual contribution limits. *Id.* at 464-65. *McConnell,* likewise, found that parties sell access to and influence over candidates and officials in return for contributions. 540 U.S. at 145-53. "[C]ontributions to a federal candidate's party in aid of that candidate's campaign threaten to create – no less than would a direct contribution to the candidate – a sense of obligation." *Id.* at 144.

Vermont faces similar concerns. Vermont's political parties, like the federal, offer preferential and private access to candidates at fundraisers in return for contributions. Tr. IX:112-13. As Sen. Ready testified, donors attending such events "haven't bought the person but they have certainly bought a piece of [their] time." Tr. IX:113. Parties also use their contributions to exert improper influence on candidates. Formerly, Vermont placed no limits on party contributions. Evidence below detailed how parties had used large contributions to "buy a candidate, if you will," and influence the candidate's votes, because candidates who are heavily financed by political parties typically follow the party's views. Tr. IX:70-71. Rep. Gordon Bristol saw candidates who received large amounts of party money and consequently "fe[lt] the need to be obligated to that cause, regardless of necessarily what their district wants." *Id.; see McConnell,* 540 U.S. at 153. He admitted that the party had pressured him to change his positions on some issues. Tr. IX:77. He testified that, based on his six years of experience in the Legislature, contributions from either special interests or political parties can affect the way a legislator votes. Tr. IX:71.

As the district court correctly observed, the "threat of corruption...often filters through the party machines," P.A. 73a-74a, and can affect the legislative agenda. Sen. Ready explained how the beverage industry exerted financial pressure to defeat a bill that expanded bottle deposits, even though the bill had overwhelming popular support. Tr. IX:105-111. Donors from the beverage industry gave large amounts of

money to both parties, Ex. V:1766, and industry lobbyists were present at party fundraisers, Tr. IX:109-10. *See* Tr. VII:66 (financial pressures from party and industry defeated drug pricing bill). Likewise, a party leader told Sen. Rivers that if her food labeling bill died in committee, he could take credit and the party might then receive a large contribution from the food industry. Tr. VII:70-71. The bill was defeated in committee. *Id.; see* Exs. I:304 (quarry interest donated $10,000 to the Vermont Republican Party six months before a key legislative vote); V:1758-59 (pharmaceutical companies sponsored party golf tournament when drug bill pending); Tr. V:30-31 (lobbyist attendance at party fundraisers necessary to obtain passage of bills).

Given the money flowing into political parties, contribution limits are further necessary to avoid evasion of Act 64's individual limits. Tr. VIII:191-92. The district court expressly found that Vermonters view political parties as "heavily influenced, if not controlled, by a few large donors." P.A. 37a. The record shows that, in 1998, the Democratic Party received 66% of its revenues from 43 contributors, while the VRSC received 46% of revenues from 39 donors. *Id.*; Exs. III:1018; VII:2403, 2408-09. Under Act 64, donors are permitted to give up to $2000 per election cycle to a political party -- between 5 and 10 times the amount a donor may give to individual candidates. 17 V.S.A. §2805(a)(P.A. 5a). Absent party contribution limits, a group of donors with similar interests (such as industry executives) could effectively "pool" contributions to a political party. The political party could, in turn, use that money to fund a significant portion of the candidate's campaign, thereby evading Act 64's individual contribution limit.[34] Trs. IX-215, 220; X-171-72; Exs. II:455,

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[34] Act 64's anti-pass-through provision, 17 V.S.A. §2805(e), is insufficient to prevent such pooling and is "likely to catch only the most blatant behavior." P.A. 71a. *Cf. McConnell,* 540 U.S. at 143 (anti-bribery laws alone will not eliminate corruption).

632-37. In fact, one of the named Plaintiffs in this case revealed that he had shifted his donations to his party because of Act 64's limit on candidate contributions. Tr. II:174. The district court accurately observed that "[i]t is reasonable to assume that larger special interest donors would do the same." P.A. 71a n.26. The limits on contributions by parties to candidates close this loophole.

Plaintiffs' argument that Act 64's party limits are too low does not withstand scrutiny. To begin with, the Court in *Colorado II* declined to afford "unique" First Amendment status to parties and rejected arguments for treating parties "differently from other political actors subject to limitation on political spending." 533 U.S. at 455. Party contribution limits are not subject to full exacting scrutiny, *see id.* at 453, 456, and the Court has no "scalpel to probe" the precise level chosen by the Legislature, *Buckley,* 424 U.S. at 30. Since Act 64's limits on party contributions mirror those for groups and individuals, the arguments supporting those limits apply with equal force to parties. *See Colorado II,* 533 U.S. at 451-52. In short, the contributions permitted under the law are meaningful acts of association in Vermont, and candidates will still be able to run effective campaigns under the limits. P.A. 39a-42a, 58a-59a; *see supra* Section III.B.

The Plaintiffs' "sky is falling" rhetoric notwithstanding, these contribution limits do not frustrate the associational rights of the political parties or undermine their ability to engage in effective advocacy. Indeed, parties are in a favored position with respect to contributions, because a state party, a national committee, and a party's legislative PACs can each make contributions to a candidate.[35] Moreover, Act 64 places

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[35] Plaintiffs' criticism of Act 64's treatment of state and local committees of a party as a single source is unjustified. The trial evidence showed that this accurately reflects the reality of how parties are run in Vermont, P.A. 77a, and Act 64 does not force a state party to centralize power at the expense of local committees, Tr. IX:10-11.

absolutely no limit on the amounts parties may independently spend to advocate for the election or defeat of candidates or to engage in other party activities, such as get-out-the-vote efforts, registration drives, platform promotion, and absentee ballot facilitation.[36] Trs. I:39, 167-69; II:121-22; IV:60-61, 103; V:35-36, IX:138; X:121-27, 174 (all describing party activities unaffected by Act 64).

Act 64's party limits, thus, serve vital governmental interests while providing for meaningful association, permitting effective campaigns and retaining the parties' important place in elective politics. As such, they are fully constitutional.

V. The Rebuttable Presumption Of Section 2809(d) Is Constitutional

Plaintiffs mistakenly contend that the rebuttable presumption of coordination for expenditures by political parties[37] that primarily benefit six or fewer candidates is unconstitutional. 17 V.S.A. §2809(d)(P.A. 8a). The argument is based on a faulty view of Vermont law and wildly overstates the effect of the presumption of coordination. Rightly viewed, Section 2809(d) imposes little, if any, burden upon parties and does not chill speech.[38]

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[36] Although Plaintiffs contend that parties will no longer be able to contribute donor or voter lists to candidates, evidence showed that parties are chary of sharing donor lists. Trs. I:90-91; V:46-47. As to party-created voter lists, which often contain many inaccuracies, Tr. VII:84-85, the record does not establish that the value of renting or buying such lists would exceed the limits of Act 64. Trs. I:167-68.

[37] The same presumption applies to expenditures by political committees that recruit or endorse candidates.

[38] Plaintiffs do not challenge Act 64's coordination provisions generally, nor could they. Coordinated expenditures may be treated as contributions. *Colorado II*, 533 U.S. at 465; *McConnell*, 540 U.S. at 219; 424 U.S. at 46-47. And, contrary to the dissent below, P.A. 231a, so long as they act independently, Act 64 places no limit upon what supporters can spend or do to champion their candidate.

Section 2809(d) imposes merely an evidentiary presumption on those expenditures most likely to have been furtively controlled by one or more candidates. P.A. 86a & n.28. Under Vermont law, such a presumption allocates the burden of production on an issue -- without changing the burden of persuasion. Vt. R. Evid. 301(a); *State v. Pluta,* 600 A.2d 291, 293 (Vt. 1991). The presumption has no effect at all unless the State or a candidate chooses to litigate whether a particular expenditure was coordinated. 17 V.S.A. §2809(d-e).

If litigation ensues -- as it could for any expenditure, whether covered by the presumption or not -- the rebuttable presumption plays a minor role. It "contributes no evidence" and "disappears when facts appear." *Rocque v. Cooperative Fire Ins. Ass'n,* 438 A.2d 383, 386 (Vt. 1981). In a case covered by the presumption, a political party need only present some evidence "that the presumed fact [is] not true" and the presumption vanishes. *Pluta,* 600 A.2d at 293; *see Rocque,* 438 A.2d at 386. This "bursting bubble" type of presumption has no effect on the burden of persuasion, which remains at all times with the complaining party. Vt. R. Evid. 301(a); *see State v. Giard,* 871 A.2d 976, 979 (Vt. 2005); Ex. II:742 (Secretary of State Regulation 2000-01, interpreting Section 2809).

Once the effect of the rebuttable presumption is properly understood, plaintiffs' arguments against it wither away. Parties and candidates need not "challenge" the presumption, nor must they affirmatively "disassociate" themselves from expenditures. Randall Br. 38-39. The statute does not shift the burden of proof or persuasion, VRSC Br. 45, or create a presumption that any party or candidate has violated the law, Randall Br. 39. All the presumption does -- and again, it comes into play only if the matter is brought to court -- is require the party making the expenditure to come forward with some evidence that the expenditure was not coordinated with the candidate. Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption. P.A. 184a; *cf. Giard,* 871 A.2d at 978 (statutory presumption of

blood alcohol level rebutted by defendant's testimony concerning his alcohol consumption); *Rocque,* 438 A.2d at 386 (presumption of receipt of notice from proper mailing rebutted by testimony that notice was not received). Indeed, the presumption merely puts the duty of going forward with evidence on the person with knowledge of the actual facts -- here, the party making the expenditures. *See* Vt. R. Evid. 301, reporter's note. Placing such an obligation on the party that is in full possession of the relevant facts makes perfect sense.

This "modest" evidentiary requirement, *Giard,* 871 A.2d at 978, imposes a minimal burden at best and does not violate the First Amendment. Vermont's rebuttable presumption is thus entirely unlike the conclusive presumption of coordination struck down in *Colorado I,* 518 U.S. at 619. Nor is it like the presumption in *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988), the principal case relied on by Plaintiffs. In *Riley*, a state statute presumed that certain fees charged by charitable fundraisers were unreasonable. *Id.* at 785-86. A fundraiser could only rebut the presumption by proving the fees were "necessary" as defined in the statute. And, even if the presumption were successfully rebutted, the factfinder could still find the fee unreasonable based on other factors. *Id.* at 786, 794. Consequently, fundraisers bore a significant initial burden and were exposed to a substantial degree of uncertainty about what fees would be found reasonable under the statute. *Id.*

Parties affected by Section 2809(d)'s presumption are nothing like the fundraisers in *Riley.* They bear no burden of proof but only a minimal burden of producing evidence on facts within their knowledge, and the test for distinguishing between independent and coordinated expenditures is clearly established by the statute, the rule and precedent. P.A. 182a-84a. As a result, parties can and should be able to understand whether their own expenditure has been coordinated with a candidate and should suffer no chilling effect on their speech.

CONCLUSION

The State respectfully requests that the Court: (a) affirm the decision below and uphold the constitutionality of Act 64's limits on the amounts that can be contributed to candidates, the presumption of 17 V.S.A. §2809(d), and the conclusion that the law's expenditure limits are supported by compelling interests; and (b) reverse the decision below and find that Act 64's spending limits are narrowly tailored and constitutional. In the alternative, if additional factual development is necessary regarding narrow tailoring, the Court should affirm the decision below and remand that issue to the district court.

Respectfully submitted,

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Nos. 04-1528, 04-1530 and 04-1697

In The

Supreme Court of the United States

Neil Randall *et al.*,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

Vt. Repub. State Comm.,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

William H. Sorrell *et al.*,
Cross-Petitioners,
v.
Neil Randall *et al.*,
Cross-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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February 8, 2006

QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Respondents in 04-1697*;

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures, Marcella Landell, Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Respondents in 04-1697*;

William H. Sorrell, John T. Quinn, William Wright, Robert Butterfield, Robert Simpson, Jr.; Vincent Illuzzi, James Hughes, David Miller, Joel W. Page, William Porter, Keith W. Flynn, James P. Mongeon, Craig Nolan, Dan Davis, Robert L. Sand and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697*[1];

Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey (deceased), Phil Hoff, Frank Huard, Karen Kitzmiller (deceased), Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697.*

Pursuant to Supreme Court Rule 24.1(b), the Corporate Disclosure Statement within Respondent-Intervenors' Brief in Response and Partial Opposition to Petitions for Writs of Certiorari is incorporated by reference.

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight, and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for Writ of Certiorari in No. 04-1528 was docketed on May 16, 2005. The Conditional Cross-Petition, No. 04-1697, was timely filed on June 14, 2005. This Court granted the Petition and Conditional Cross-Petition on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents, Cross Petitioners Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Phil Hoff, Frank Huard, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson include Vermont citizen groups, individual voters, current and former legislators and officeholders, non-incumbent candidates for state office, Republicans, Democrats, and Independents, who supported and worked for the enactment of Act 64 of the 1997 Vermont Legislature, VT. STAT. ANN. tit. 17, §§ 2801-83 (2005) ("Act 64"), and intervened below to defend the law against this facial challenge to its constitutionality. They join in the Statement of the Case set forth in the brief of Respondents, Cross Petitioners William H. Sorrell *et al.*

SUMMARY OF ARGUMENT

1. The court of appeals correctly determined that Vermont's campaign expenditure limits, 17 VT. STAT. ANN. § 2805a, may be upheld consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in view of the critically important governmental objectives those limits serve: deterring actual and apparent corruption, fostering public confidence in government, protecting candidate and officeholder time from the burden of fundraising, and assuring officeholder accountability through competitive elections. The limits were

enacted in response to deep and broad public concern about the detrimental impact of unlimited fundraising and campaign spending on Vermont's political system. These concerns were documented in lengthy public deliberations before the Vermont Legislature and confirmed by an exhaustive trial record that fully satisfies First Amendment scrutiny.

a. *Buckley*'s requirement of exacting scrutiny does not, as Petitioners urge, automatically invalidate expenditure limits no matter how compelling the interests they serve and no matter how tailored to the costs of running an effective campaign in local political conditions. Instead, it allows such limits to be upheld on a proper record. Under the "closer scrutiny" applicable to spending limits, *McConnell v. FEC*, 540 U.S. 93, 134 (2003), the Court should examine Vermont's post-*Buckley* experience to determine if new facts or legal interests demonstrate compelling justifications for Vermont's spending limits, and if the particular limits chosen by Vermont are sufficiently tailored. Requiring courts blindly to strike down all spending limits without weighing evidence or examining facts would be inconsistent with a proper understanding of our constitutional scheme, which must leave room for states' authority to safeguard their systems of representation in light of states' unique understanding of their own political environments.

b. Vermont's limits on campaign spending are justified by its compelling interests in deterring the reality and appearance of corruption and preserving public confidence in government. Those interests are reflected in the extensive legislative and court record in this case, which in turn reflects the State's increasingly troubled experience with unlimited campaign spending. With no spending restrictions, officeholders orient their legislative choices to contributors, fearing that an opponent will otherwise be able to out-raise and out-spend them. Even when contributions are limited, candidates remain dependent on special interests that can generate large aggregate contributions for the campaign funding race. The record contains frank admissions by

experienced officeholders that the legislative agenda too often is guided by the fundraising "arms race." The Vermont public perceived, with good reason, that legislative policy and access were for sale.

The spending limits also serve Vermont's vital interest in protecting the time of officeholders and candidates from endless preoccupation with fundraising. Act 64 will protect the quality of representative government by enabling elected officials better to perform their duties as representatives and permitting candidates to focus their time and attention on their broad constituency rather than on a narrow group of funding sources.

Vermont's spending limits, in addition, are necessary to assure officeholders' ultimate accountability to voters, which can only be secured in a system that allows meaningful electoral competition. Under a system of unlimited campaign spending, incumbents amass war chests that deter challengers and leave many elections effectively uncontested, thus diminishing officeholder accountability and robust public debate of issues. In this respect in particular, Act 64 furthers, rather than undermines, First Amendment interests.

c. The record demonstrates that Act 64's expenditure limits are narrowly tailored to serve these compelling interests. As the district court found based on an extensive record at trial, and the court of appeals confirmed, Vermont's spending limits are set at levels that permit candidates to run effective, vigorous campaigns. And, contrary to Petitioners' charge of "incumbent protection," the evidence demonstrates that in fact incumbents benefit the most from a system of unlimited spending because of their ability to out-raise and out-spend their challengers. Moreover, Act 64 places a lower spending limit on incumbents than on challengers, ensuring that the incumbent's traditional advantages will not be compounded by a spending advantage.

Nor are there feasible alternatives to spending limits that will allow Vermont to achieve its compelling interests. The alternatives suggested by Petitioners do not remedy the

concerns that prompted Act 64 but rather create equally troubling problems of their own. None of the alternatives proposed would permit Vermont to achieve its crucial goal of assuring the integrity of its electoral process.

d. While the Court need not look beyond *Buckley*'s standard of exacting scrutiny to uphold Vermont's spending limits, the Court may also uphold those limits as a content-neutral regulation of speech. They meet the governing standard for content neutrality set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), because they are "*justified* without reference to the content of the regulated speech." The spending limits are narrowly tailored to serve a significant government interest and are set at a level allowing robust and effective campaigns, thus leaving open ample channels of communication.

2. Vermont's limits on contributions to candidates, 17 VT. STAT. ANN. § 2805, also satisfy this Court's well-established requirements. The Court's precedents repeatedly have confirmed the importance of limits on contributions as a means of deterring the perception and reality of corruption. Act 64 appropriately tailors the contribution limits to amounts that are "considered by the legislature, candidates and officials to be large contributions," J.A. 20, while allowing candidates to raise enough money to run effective campaigns. In asking the Court to second-guess the judgment of Vermont's elected lawmakers as to the contribution levels needed for effective campaigning, and to impose on Vermont the same limits that exist in much larger states where campaigns are far more expensive, Petitioners ignore that courts have no "scalpel to probe" the level at which a contribution limit should be set. *Buckley*, 424 U.S. at 21.

In addition, as set forth more fully in the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, Act 64's limits on political party contributions to candidates and the statute's rebuttable evidentiary presumption that certain party expenditures are "related expenditures" fully satisfy

constitutional requirements and should be upheld by the Court.

ARGUMENT

I. Vermont's Limits on Candidates' Campaign Expenditures Satisfy First Amendment Scrutiny.

A. Vermont's Expenditure Limits Are Permissible Under Buckley's *Standard of Exacting Scrutiny.*

Vermont enacted limits on candidates' campaign spending to protect the integrity and accountability of Vermont government and preserve the confidence of the State's citizenry in the electoral process.[2] Petitioners contend that any such regulation is *per se* forbidden by the First Amendment. That argument should be rejected. Act 64's spending limits further the most weighty governmental interests, including interests that are essential to fulfilling the purposes of the First Amendment.

Petitioners' principal contention is that this Court in *Buckley v. Valeo* created an absolute First Amendment right to engage in unlimited spending, no matter how great the

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[2] Act 64 set the spending limit for candidates for Governor at $300,000; for Lieutenant Governor at $100,000; for Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General at $45,000; for State Senator or county office at $4000 plus – in the case of candidates for State Senator an additional $2500 for each additional seat in the Senate district; and for State Representative at $2000 in a single-member district and $3000 in a two-member district. 17 VT. STAT. ANN. § 2805a. Incumbent candidates for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General are entitled to expend only 85 percent of the spending limit for their respective offices, and incumbent candidates for State Legislature are entitled to expend only 90 percent of the spending limits for their offices. 17 VT. STAT. ANN. § 2805a(c). In 2005, the Legislature increased the spending limits by tying them to the Consumer Price Index. 17 VT. STAT. ANN. § 2805a(e). *See* Vermont Secretary of State, Guide to Vermont's Campaign Finance Law (November 2005), http://vermont-elections.org/ elections1/2005_cf_guide_1118.htm (last visited Feb. 7, 2006) (listing updated spending limits).

harms to governmental interests and no matter how closely a limit is tailored to local political conditions. In fact, *Buckley* requires "exacting scrutiny," 424 U.S. at 16, not automatic invalidation, and permits spending limits to be upheld on a proper record. Contrary to the contention that expenditure limits are forbidden, this Court has confirmed that they simply are subject to "closer scrutiny" than are limits on contributions. *McConnell*, 540 U.S. at 134; *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado Republican II*"), 533 U.S. 431, 440 (2001).[3] Petitioners' contrary reading attributes to *Buckley* a *per se* rule directly at odds with the Court's "strict scrutiny" jurisprudence; such review is not "strict in theory but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citations and internal quotations omitted).

This context, more than any other, calls for a careful application of constitutional scrutiny rather than the categorical imposition of *per se* rules. The Tenth Amendment preserves for the states "the power to regulate elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citation and internal quotations omitted). States moreover play an essential role as laboratories of reform in our federal system. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The doubts expressed by the *Buckley* Court that expenditure limits would be necessary to protect the integrity of government are fully addressed by the record in this case. *Buckley* embraced the government's compelling interests in deterring the reality and appearance of corruption and assuring public confidence in government, 424 U.S. at 26-27, but believed, on the record before it, that the contribution limits of the Federal Election Campaign Act ("FECA"), Pub.

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[3] Although the Court confirmed in *McConnell* and *Colorado Republican II* that expenditure limits are subject to closer scrutiny, neither those cases nor any case before this Court since *Buckley* has reviewed a statute limiting candidates' expenditures.

L. No. 92-225, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974), alone would be sufficient to serve those interests. *See id.* at 56 ("There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient[.]").[4] Thus, *Buckley* rejected the assertion that spending caps were a necessary concomitant to contribution limits only as a matter of fact, not of law.

Nor did *Buckley* foreclose consideration of factual developments illuminating different compelling interests, such as protecting the time of officeholders and candidates, as well as assuring officeholder accountability through competitive elections, that could justify campaign spending limits. Three particular governmental interests were presented in *Buckley*: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. 424 U.S. at 55-56. This Court did not broadly hold that other compelling interests could never be considered; rather, it stated that "[n]o governmental interest *that has been suggested* is sufficient to justify [the federal spending limits]." *Id.* at 55 (emphasis added).

Vermont's thirty years of experience post-*Buckley*, reflected in the record here, demonstrate that, in fact, limits on overall spending are necessary to respond to the realities of campaign-finance-related corruption and undue influence, assure public confidence, and protect the quality of representative government. Pet. App. 128a-35a & n.13; *infra*

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[4] Prior to the Federal Election Campaign Act of 1971 and the 1974 amendments to FECA, neither individual contributions nor spending in federal elections had been subject to meaningful limits. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 15-17 (2005) (describing ineffectiveness of pre-FECA limits).

this Part; *McConnell*, 540 U.S. at 152 (government entitled to take into account "the realities of political fundraising" revealed by the record).

Experience also has not borne out *Buckley*'s assumption (*see* 424 U.S. at 19) that a restraint on spending would operate identically to a direct restraint on speech. In fact, as demonstrated more fully *infra*, the post-*Buckley* record shows that campaign spending is a function of many factors unrelated to the needs of communication and debate, including special interests' determination to secure favorable governmental policies, and the use of campaign war chests to deter challengers. Even the research of Petitioners' expert establishes that increased campaign spending reflects not the increased costs of getting candidates' messages out to voters, but instead the fact that "[t]he more favors the government has to give out, the more resources that people will spend to obtain those favors." Ex. VI:2202, Tr. III:206-07 (Lott); *see* Ex. VI:2264 (characterizing as a "myth" the contention that increased costs of television advertising account for increased campaign expenditures).[5]

A rule automatically invalidating expenditure limits would disregard the significance of the interests underlying campaign finance laws.[6] As Respondents now demonstrate,

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[5] "Tr." refers to the trial court transcript, the entirety of which was made part of the Second Circuit record; "Ex." refers to the sequentially paginated trial exhibit appendices submitted to the Second Circuit.

[6] The lack of merit in such a mechanical rule of invalidation is particularly clear in light of the facts of this case. Petitioners state that even an "unknown challenger" can run an effective campaign in Vermont for "$4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor." VRSC Br. 42. Yet Petitioners' proposed First Amendment right to engage in unlimited campaign spending would require this Court to invalidate Vermont's limits without *any* consideration of the compelling interests they serve, even if the limits were set at the level Petitioners *concede* to be adequate for an effective campaign by the *most* disadvantaged candidates. *But see infra* Part I.C.1 (demonstrating that Petitioners' figures are in fact inflated and that fully effective campaigns can be conducted under Act 64's limits).

the interests underlying spending limits are notably of constitutional magnitude. Deterring corruption, fostering public confidence in government, protecting candidate and officeholder time, and assuring officeholder accountability through competitive elections all safeguard the political representation that is the essence of our constitutional democracy. By serving these interests, Vermont's spending limits "protect the integrity of the electoral process," the "very 'means through which a free society democratically translates political speech into concrete governmental action.'" *McConnell*, 540 U.S. at 137, 158 (recognizing protection of integrity of electoral process as a "constitutional interest[]") (citation and internal quotations omitted).[7] "[W]hat is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process[]" – issues "not less than basic to a democratic society." *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) (addressing Corrupt Practices Act).

B. Vermont's Weighty Interest in Preserving the Integrity of Its Democratic Process Justifies the State's Limits on Candidates' Campaign Spending.

1. The Pressures of Unlimited Fundraising Foster Corruption, Undue Influence, and Public Cynicism About the Integrity of Vermont Government.

Deterring corruption of elected officials and avoiding the appearance of corruption are prototypical compelling governmental interests. *McConnell,* 540 U.S. at 143-54; *Buckley*, 424 U.S. at 26-27. The interest in deterring

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[7] Although *McConnell* addressed contribution limits, the Court stated that its analysis "reflects more than the limited burdens [the contribution limits] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits." 540 U.S. at 136.

corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U.S. at 150 (citation and internal quotation marks omitted). Manifestly, a state has a compelling interest in maintaining the public's "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). *See also McConnell*, 540 U.S. at 187 ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders"); *cf. id.* at 317 (Kennedy, J., concurring in the judgment in part and dissenting in part) (campaign regulations that directly address "candidates' and officeholders' quest for dollars" lie closer to core of *Buckley*'s anti-corruption concern than measures less directly concerned with candidates' solicitation of funds).

a. Without spending limits, Vermont candidates increasingly feel compelled to raise the maximum amount possible to forestall the possibility of being outspent. Witnesses described "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII:57 (Smith). "I guarded against [being outspent] by raising more money than I thought that I'd need and more money than I thought [my opponent] would raise or spend." Tr. V:32 (Hooper). *See also* Tr. VII:75-76 (Rivers); Tr. II:198 (Patch). Instead of promoting a candidate's autonomous choice of how much to spend in disseminating his message, the absence of spending limits "condemns [candidates] to a cyclical prisoners' dilemma, where each candidate must continue to raise and spend more money in order to prevent the other from obtaining an advantage." Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609,

1617 (1999).[8] As the court of appeals observed, "[t]he significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating this potential of being vastly outspent that leads to the 'arms race' mentality among candidates and elected officials." Pet. App. 149a.

Petitioners point out that campaigns in Vermont are "relatively low-budget affairs." Randall Br. 32. However, while it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more, Tr. VII:75-76 (Rivers); Tr. V:31-32, 51 (Hooper); Tr. VIII:57-58 (Smith); Tr. IX:134 (Ready), or because a campaign war chest deters potential opponents, Ex. I:0394-0395 (Frothingham); Tr. III:163-164 (Lott); Tr. X:80 (Gross).

b. The debts incurred in this money chase come due after election day. Vermont's experience demonstrates that, under a system of unlimited campaign expenditures, the fundraising chase directly drives legislative and governmental policy in a manner antithetical to the proper functioning of representative government. As the court of appeals found, "[t]he agenda of candidates and elected officials is affected by the perceived need to raise increasing amounts of funds. . . . This affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed." Pet. App. 150a. It continued, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns." *Id.* 134a. Even plaintiff Donald Brunelle acknowledged that when a

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[8] As Professor Neuborne observes, "[t]he vast bulk of candidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War." *Id.*

candidate solicits donations, "now you're beholden to those people that you're asking in some cases." Ex. VII:2706.

Both at trial and during the legislative process leading to the enactment of Act 64, witnesses intimately familiar with Vermont politics repeatedly described the growing influence of fundraising pressures in determining public policy, and the resulting harm to the integrity of state government. *See* Tr. IX:88-95, 100-12; Ex. III:0785, 0787; Ex. V:1766 (testimony and exhibits on influence of slate industry over development permit exceptions and bottle industry donors over bottle redemption bill). Representative Marion Milne, a Republican and a defendant-intervenor, commented during floor debate on Act 64: "We have candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity." Ex. II:0732.[9]

Because of the pressures to avoid being bested in the race for campaign funding, the consequences of losing an entire industry as a source of donations directly influence the actions of legislators. "'We've already lost the drug money, and I don't need to lose the food manufacture[r] money too'" becomes the dubious touchstone of policymaking. Pet. App. 131a; *see* Tr. VII:70. A former Republican Lieutenant Governor of Vermont, Peter Smith, confirmed that the need for campaign cash constantly intrudes on policy decisions: "You have to initially consider . . . whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." Tr. VIII:26. As one example, Mr. Smith described how the campaign funding provided by a professional group (ophthalmologists) "absolutely was" a factor as he considered casting a tie-

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[9] *See also* Ex. II:0505 ("[c]ampaign fundraising and lobbying are inextricably, completely linked in Vermont"); Tr. VII:74-75; Ex. III:0763.

breaking vote on legislation affecting the group. Tr. VIII:41-42; *see* Tr. VIII:43 (it "tarnished the process").[10]

Regardless of the formality or informality of the methods used, a special interest's financial clout with candidates extends far beyond the size of individual contributions when the need for funds is limitless. Donors affiliated with a particular interest can coordinate the timing of their contributions through formal or informal "bundling" practices,[11] or can contribute at fundraising events where a company or industry group is given access to legislators.[12] Or, in a small state such as Vermont, it often will simply be obvious when, for example, the slate industry or health care interests are generating multiple contributions to candidates.

This spending chase also saps public confidence in government, because the perception of corruption is a function not just of the size of donations, but also of high overall levels of fundraising. The Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have

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[10] "[T]he merits of the case were, if you will, infused . . . by the financial power of the groups. . . . We were talking about merit on the one side, which was a technical judgment, and power as represented in money on the other side." Tr. VIII:42.

[11] *See* Pet. App. 100a (noting "widespread use of manipulative contribution devices, such as 'bundling,' which enable special interests to direct large quantities of money by way of individual contributions to particular candidates"); Ex. III:0783; Tr. V:63-64; Ex. I:0218-19. "Donors and recipients understand that bundled contributions are not isolated contributions, but a block of gifts coming from the same source." Lisa Rosenberg, Center for Responsive Politics, *A Bag of Tricks: Loopholes in the Campaign Finance System* (1996), *available at* http://www.opensecrets.org/ pubs/law_bagtricks/contents.asp (last visited Feb. 7, 2006). The impact of bundling cannot be addressed by a ban on indirect donations, because donors can easily coordinate the timing of their contributions without having to transmit them indirectly.

[12] Tr. IX:112-13 (Ready); Tr. VII:58-61 (Rivers); Ex. III:0766; *see also id.* at 0767-768, 0770, 0755 (news articles on use of fundraisers to provide access).

increased," lessening "[c]itizen interest, participation, and confidence in the electoral process." J.A. 20-21.[13]

Petitioners argue that Vermont officeholders are merely showing a healthy responsiveness to supporters when they make legislative decisions based on fundraising needs. VRSC Br. 49. This argument is misguided. A legislative policy decision based on the need for campaign cash is not equivalent to a legislative policy decision based on the needs of voters. If it were, anti-bribery laws would become constitutionally suspect. "[S]uch influence of campaign contributors is pernicious because it is bought. . . . Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it." Pet. App. 134a. "Implicit . . . in the sale of access is the suggestion that money buys influence." *McConnell*, 540 U.S. at 154. The First Amendment should not be transformed into an instrument requiring Vermonters to accept this state of affairs.[14]

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[13] *See* Tr. VIII:58-59 (Smith) (when candidates' focus is "raise as much money as you can raise," it "leads to the sense that the process is about someone else and for someone else and available to other people" and effect on public perception is "corrosive"); Tr. V:83-84 (Hooper) (the concern "applies as well to the spending of money" because citizens "feel powerless and extremely cynical" when they see "campaigns costing ever more money"); Ex. III:0916-17 (Douglas) (big spending means big fundraising, and creates appearance of corruption); Ex. III:1040-41 (Gross report) (high-spending campaigns can dampen participation by reinforcing the public's cynicism about the impact of money on the political process); Ex. V:1831-32.

[14] *Buckley* observed that no harm would result if a candidate raised one dollar from a million people and then spent it all. 424 U.S. at 56 n.64. From this, Petitioners conclude that funds "legally raised" cannot give rise to the reality or perception of corruption. Randall Br. 26. But, as the court below noted, "the reality of campaign financing in Vermont is a far cry from [Buckley's] idyllic vision of political fundraising." Pet. App. 133a. Instead, the financial constituencies that can generate large funding amounts, not the hypothetical one-dollar donor, command the candidate's attention. *Buckley* does not forbid courts from taking into account "the

c. Spending limits alter the dynamic of unlimited indebtedness flowing from unlimited fundraising in Vermont. First, when a candidate knows the upper limit of funds that will be necessary for a campaign, the pressure to court and orient policymaking decisions to a particular special interest based on its financial clout is greatly reduced, since each additional dollar no longer is irreplaceable. Candidates will no longer be locked into "the sort of stampede or nuclear arms race mentality that we currently have." Tr. VIII:57 (Smith). As the Second Circuit noted, "with a limit on how much money can be spent, elected officials testified that they would be more willing to take a position which a particular industry opposed." Pet. App. 150a.

Second, spending limits enhance voters' ability to hold candidates accountable for financing their campaigns in ways that create indebtedness to particular narrow interests. When there is an upper limit on the funds a candidate may collect, the excuse that "I can't unilaterally disarm" falls away, making candidates more accountable to voters for the funds they pursue. In the absence of such a limit, a candidate who courts large aggregate sums from, say, labor or the financial services industry has a ready-made excuse: "I can't afford to limit my fundraising because my opponent may outspend me if I do."[15] Voters have little ability to punish candidates at

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realities of political fundraising" revealed by the record. *McConnell*, 540 U.S. at 152.

Nor are Petitioners correct in arguing, per Judge Winter's dissent, that *Buckley* fully considered and addressed the array of practices, such as bundling, that can erode the effectiveness of contribution limits in combating the reality and appearance of corruption. Judge Winter points to the "highly publicized scandal" of pooled contributions by the dairy industry at the time of *Buckley*. Pet. App. 262a. But those defending the FECA limits in *Buckley* argued that FECA's *contribution* limits and its regulation of political committees would address the abuses revealed by the dairy industry's practices. Br. for Appellees Center for Public Financing of Elections et al. 131-32 (Nos. 75-436, 75-437).

[15] *See* Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4

the ballot box for incurring such indebtedness to special interests, because the candidate's opponent is doing the same.

Third, by reducing candidates' preoccupation with fundraising, spending limits will strengthen public confidence and participation in government in Vermont. By including limits on both spending and contributions, a principal sponsor of the bill explained that the legislation sought to " turn around the cynicism and the lack of participation on the part of many ordinary people that believe that their government is not about them, but about powerful, special interests. . . . [T]hat trend is corrosive and damaging to democracy . . .." Tr. VII:88 (Rivers).

2. Unlimited Campaign Spending Harms the Integrity of Vermont State Government Because Candidates Spend Inordinate Time and Attention on Fundraising.

Concern over the amount of time that candidates devote to fundraising was a critical part of the public debate leading to the enactment of Vermont's spending limits, and was confirmed by trial testimony. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures–which tend to . . . free candidates and their staffs from the interminable burden of fund-raising . . . –will be adverse to

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CONN. PUB. INT. L.J. 308, 335-37 (2005) (describing negative consequences to candidates who turn down campaign donations).

the interest in informed debate protected by the First Amendment.").

a. As the court of appeals found, "the evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." Pet. App. 140a. "[U]nlimited [campaign] expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests," *id.* 139a,[16] and "financial necessity . . . requires that elected officials spend time with donors," *id.* 141a-42a; *see id.* 140a (donors able to "dominate candidates' time."); Tr. IX:166-67, 194; Tr. V:29-30; Tr. VII:24; Ex. III:0896 (all describing how fundraising pressures allow donors to command officeholders' time).[17]

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[16] *See, e.g.*, Ex. I:0092 (fundraising demands required Vermont candidates to concentrate on "out-of-state fundraising events" in "Washington, New York or California") (floor speech of Sen. William Doyle (R)); *id.* (Act 64 necessary so that "there will be increased time for real debate; that candidates will be able to concentrate more on issues rather than raising public money"); Ex. III:0773 (prominent Vermont business lobbyist observes that "[p]oliticians are forced to spend as much time begging as they do campaigning"); Tr. VIII:24 (Smith) (the farther a candidate progresses politically, "ineluctably, the more time you spen[d] . . . raising money and the more attention you pa[y] to the people who gave you big money"); Tr. V:119 (Hooper) (in running campaigns with no limits, the "way I would spend my evenings often . . . would be back hustling campaign money" instead of making contact with voters); Ex. I:0095 (legislative finding noting that candidates for statewide office "are spending inordinate amounts of time raising campaign funds").

[17] *Buckley* did not address the governmental interest in protecting the time of officeholders as a basis for candidate spending limits. *See* Pet. App. 138a-39a; Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. (forthcoming 2006) (manuscript at 30 n.28, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816244 (last visited Feb. 7, 2006)); Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1287 (1994).

The time demands of fundraising harm Vermont's representative process in several related ways. The time occupied by fundraising is a distraction from the representative function, as confirmed by the district court's factual finding that "the need to solicit money from large donors at times turns legislators away from their official duties." Pet. App. 36a. This has real costs for the quality of representation, a concern of constitutional dimension in any democracy. As one scholar has observed,

> [T]here is a failure of representation when candidates spend as much time as most of them now do attending to the task of fund-raising. This feature of modern representation should trouble those who favor close constituent control as well as those who favor relative independence for legislators; those who favor an "aristocracy of virtue" as well as those with more populist ideals regarding who should serve . . . . Whatever it is that representatives are supposed to represent . . . they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.

Blasi, *supra*, at 1304.[18]

The pressures of unlimited fundraising also undermine the role of the campaign itself as a forum for open and robust public debate. In a democracy based on ideals of self-government, campaigns for public office do not exist solely to allow one-way communication of a candidate's views to the electorate, but also importantly serve as a principal means

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[18] *See also* Richard Briffault, Nixon v. Shrink Missouri Government PAC: *The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1769-70 (2001); Alexander, *supra*, at 12-17 (describing evidence of damage to the representative function).

of "educating candidates – preparing them to most effectively represent the people." Alexander, *supra*, at 37. "In order to function fully, representative democracy requires that the people be able to educate and even instruct their elected officials, so that their will may be done in government." *Id.* The process of dialogue and education is woefully shortchanged if a candidate's time is preoccupied with courting and listening to donors rather than to the candidate's much larger voting constituency.

The district court, after a ten-day trial, found that Vermont's spending limits are "an effective response" to "certain compelling governmental interests not addressed in *Buckley*," including "'[f]reeing office holders so they can perform their duties.'" Pet. App. 65a (citations omitted). If campaigns are governed by spending limits, explained one legislator:

> I can spend the whole rest of my campaign, once I have raised that money, out with the public . . . . I can go door to door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere making fundraising calls.

Tr. IX:129 (Ready). *See* Tr. VII:72, 88 (Rivers); *see also* Tr. V:119 (Hooper); Tr. VIII:23-24 (Smith); Tr. IX:194-95 (Pollina).

Notwithstanding the relatively low costs of Vermont campaigns, the evidence canvassed above, the findings of the Vermont Legislature, and the findings of both courts below all establish that the distractions of fundraising already have distorted the representative process in Vermont and that the problem will continue to worsen as fundraising in one election raises the bar for the next. This Court has decisively rejected the contention that "a State's political system [must] sustain some level of damage before the

legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). That principle applies fully here.

b. Petitioners err in arguing that Vermont should address its time-preservation interest by raising or eliminating the State's limits on the size of contributions. VRSC Br. 43-44. That approach is implausible because it would require the State to abandon its compelling interest in deterring the corruption that stems from candidates' receipt of large contributions (*see infra* Part II), and thus would "'deny to the [state] in a vital particular the power of self protection'" *McConnell*, 540 U.S. at 224 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).

Nor is there merit to the argument that contribution limits create the problem of excessive attention to fundraising. Only a comprehensive system in which both contributions and expenditures are subject to some reasonable limit can address the State's compelling interests in time-preservation and deterring corruption. In a system with no spending limits and no contribution limits, the time devoted to fundraising – and to courting the wealthiest interests at the expense of outreach to a broad constituency – will only continue to increase. If one candidate can raise a large war chest from a handful of donors, an opponent wishing to eschew such indebtedness will be forced to spend even more time fundraising to catch up than if all candidates faced limits on the size of contributions. And because a candidate would never know how much an opponent might raise, the pressure to engage in unlimited fundraising would be unabated. "No package of campaign finance reforms will change substantially how representatives spend their time unless war chests are made unimportant." Blasi, *supra*, at 1285.[19]

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[19] Nor would raising the contribution limits reduce the time candidates spent on fundraising. When Congress raised FECA's hard-money limits from $1,000 to $2,000 in 2002, *see* 2 U.S.C. § 441a, federal candidates did not raise the same overall amount in larger chunks; instead,

3. The Critical Interests Served by Electoral Competition Justify Vermont's Spending Limits.

In addition to the compelling interests recognized by the Second Circuit just discussed, other substantial governmental interests support the constitutionality of Act 64's expenditure limits. The accountability of elected officials and the very possibility of a robust debate of the issues depend upon competitive elections.

> Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable. Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose[] a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Ex. III:1044-45 (Report of Dr. Donald Gross). *See* Tr. IX:132-33 (Pollina); Tr. IX-132 (Ready); Ex. I:0394-96 (testimony before legislative committee). Unlimited

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they simply increased their overall fundraising, expanding the arms race and placing ever more emphasis on fundraising. Indeed, in 2004, after the federal hard-money contribution limits were raised, both major-party presidential candidates opted out of the public financing system for their primary elections, with President Bush raising over two-and-a-half times more than in his 2000 primary ($269.6 million in 2004 compared with $95.5 million in 2000) and the Democratic nominee raising nearly five times the 2000 primary amount ($234.6 million for Senator Kerry in 2004 versus $48.1 million for Vice President Gore in 2000). Federal Election Commission, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), *available at* http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html (last visited Feb. 7, 2006).

campaign spending, by undermining the very conditions needed to promote a debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), thus threatens, rather than promotes, First Amendment values. As the Vermont Legislature found, "Robust debate of issues . . . [has] decreased as campaign expenditures have increased," and many Vermonters are unable to seek election to public office due to the great financial burden of running campaigns. J.A. 20.

Vermont has conducted its elections without limits on campaign spending since 1976. During the nine election cycles prior to the enactment of Act 64, only one incumbent lost a campaign for any statewide office. In many of these elections, the incumbent had no viable challenger. For the office of State Treasurer, the incumbent had no major opposition in five of those races; for Secretary of State, the incumbent had no major challenger in four races; for Attorney General, the incumbent had no major challenger in six races. Ex. V:1692-94.[20]

Thus, Petitioners' claim that unlimited spending allows challengers to overcome the incumbents' advantages rests on the flawed assumption that most challengers are capable of outspending incumbents. Especially as races become more expensive, incumbents generally have an easier time raising

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[20] In elections for Congress, campaign expenditures also have remained unlimited since 1976. Congressional incumbents nevertheless have consistently enjoyed re-election rates of over 90%. Ex. III:1046. In 2004, 98.7% of House incumbents won re-election. (This figure, which excludes the two House elections in which incumbents faced each other, was calculated based on data from Center for Responsive Politics, 2004 Election Overview, Winning vs. Spending, *available at* http://opensecrets.org/overview/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 4, 2006). Challengers for a House seat in that same year raised $192,945 on average, while House incumbents raised an average of $1,122,385. By contrast, in Albuquerque, New Mexico, which enforced mandatory spending limits for city elections for over twenty-five years, no incumbent mayor was re-elected while the limits were in force. Tr. X:87-88 (Gross).

money for their races than challengers because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III:212 (Lott); Tr. X:80 (Gross); Tr. IX:231-32 (Pollina).[21] In the three election cycles prior to the effective date of Act 64, the gubernatorial challengers were consistently outspent, and defeated, by the incumbent. J.A. 84-86; *see also* Pet. App. 42a-44a. Senate incumbents in Vermont spent more money than challengers in each of the three election cycles studied. J.A. 87.[22]

The many advantages enjoyed by incumbents, such as their greater name recognition, often therefore are simply compounded by the incumbents' ability to outspend the challengers as well. Even Petitioners' witnesses confirmed that the worst-case scenario for a challenger is when an incumbent's built-in advantages are combined with the ability to outspend the challenger. *See, e.g.*, Tr. I:210 (Garahan).

Empirical research further demonstrates that, for challengers to be competitive, the important factor is not the absolute level of their spending, but the ratio between their spending and that of the incumbent. Ex. III:1048. Act 64 guarantees that any challenger who is able to raise the full amount permitted by the limits will be able to *outspend* the incumbent, because the spending limits applicable to incumbents are lower than those applicable to challengers.

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[21] Indeed, some of the Petitioners in this case were outspent by the incumbents they challenged and had never been able to raise sums for their campaigns as large as those permitted by Act 64's limits. *See* Tr. II:32, 34 (Libertarian Party Chair Scott Berkey); Ex. V:1755 (Brunelle). It is absurd for Petitioners to suggest that they would have done worse under Act 64, which permits challengers to outspend incumbents. *See also* Ex. VIII:3076-77 (Petitioners' witness Wright); Tr. I:68-70 (Petitioners' witness Snelling).

[22] In the Vermont House, while challengers on average spent slightly more than incumbents, both challengers and incumbents spent less than the Act 64 limits would allow, and the limits therefore would not impede House challengers in these very low-budget races. J.A. 88.

Pet. App. 7a. The pro-competitive impact of this system is confirmed by one of Petitioners' expert witnesses, whose research indicates that imposing lower spending limits on incumbents than on challengers would make campaigns more competitive over time. Tr. III:217-19 (Lott).[23]

Research not available to the *Buckley* Court further demonstrates that high levels of campaign spending not only inhibit the robust debate fostered by competitive elections, but also do nothing to encourage voters' engagement with the electoral process. Examination of the impact of spending levels shows that, if anything, higher spending discourages individual voter engagement. While higher spending may increase candidate name recognition, it tends to decrease the likelihood that a voter will be interested in an election, concerned about the outcome of the election, or able to discern the ideological placement of the candidates. Tr. X:71-76 (Gross); Ex. V:1800-1805 (analysis of campaign spending and cognitive engagement); Ex. V:1810-1815 (statistical basis of analysis). Higher spending also is more likely to decrease an individual's likelihood of participating in the election. Tr. X:56-58 (Gross). The reality is thus very different from the assumption of the Court in *Buckley*, based on the limited record before it, that the more candidates spend, the more they "make their views known" to the electorate, thus enabling the electorate better to evaluate

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[23] Petitioners cite a witness's complaint that incumbents should be limited to fifty percent of the challenger's spending to eliminate entirely the advantages of incumbency. VRSC Br. 43. This complaint is illogical because the system of unlimited spending that Petitioners advocate does not hold incumbent spending to fifty percent of the challenger's spending either. The relevant question cannot be whether the spending limits completely eliminate incumbents' advantages, which exist independently of Act 64, but whether, as the evidence shows, the limits are likely to make elections more competitive than the current system.

candidates and "choos[e] among them on election day." 424 U.S. at 52-53.[24]

Although Petitioners emphasize *Buckley*'s holding that the mere desire to enhance the relative voices of those who lack campaign funds did not justify FECA's spending limits, 424 U.S. at 48-49, the interest in promoting electoral competition is of a wholly different character. It is based not on concerns about whether one candidate is poorer than another, nor whether one speaks more loudly than another, but instead on the goal of securing officeholders' ultimate accountability to voters, which can happen only in a system that allows meaningful competition. "[T]he possibility that in any given election the people may exercise their authority to vote out current officeholders[] is the ultimate security of popular control over government." Richard Briffault, *The Return of Spending Limits: Campaign Finance After* Landell v. Sorrell, 32 FORDHAM URB. L.J. 399, 433 (2005). As noted, that possibility is thwarted when incumbents combine their built-in advantages with the ability to out-raise and out-spend their challengers.[25] The same lack of voter choice and control results in an open-seat race when a candidate with a huge funding advantage enters the race and discourages other challengers from coming forward. *Id.* at 434. "[T]he interest in competitive elections . . . is constitutionally compelling because electoral competitiveness is essential to the public

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[24] Indeed, polling data shows that Vermont voters view less expensive sources of information, such as public forums, meeting the candidate in person, and unpaid news coverage, as more important sources of information about candidates than paid media. Ex. III:0846-0847, 0851.

[25] Moreover, this dynamic is often at work even in races in which the incumbent ends up spending little. Serious challengers often do not run because they recognize that the incumbent can gear up his fundraising operation to meet any real threat from a challenger. Tr. X:33; *see also* Tr. VII:148. A system of unlimited spending thus paradoxically may result in a quieter campaign than would be true if limits were in place that assured challengers they will not be badly outspent.

accountability that elections are intended to promote." *Id.* at 435.

C. *Vermont's Limits Are Sufficiently Narrowly Tailored to Satisfy Exacting Scrutiny.*

The court of appeals remanded the case for the district court to determine whether Vermont's spending limits are sufficiently narrowly tailored to satisfy constitutional scrutiny. That aspect of the judgment should be reversed, and this Court should enter a judgment holding that the expenditure limits satisfy the First Amendment, as the record adequately demonstrates the narrow tailoring of Vermont's spending limits. Act 64 permits candidates to amass the resources needed for effective campaigns, and there are no less restrictive alternatives that will adequately serve Vermont's compelling interests.

1. Act 64 Permits Candidates to Amass the Resources Needed for Effective Advocacy.

Vermont's spending limits are narrowly tailored to allow candidates to "amass[] the resources necessary for effective advocacy," *see Buckley*, 424 U.S. at 21.[26] In setting the limits, the Vermont Legislature considered such factors as the State's population, costs of campaigning, past spending patterns in elections, the testimony of numerous witnesses at hearings, and legislators' knowledge of campaign costs. Ex. I:92, 254-63, 267; Ex. II:443, 533-34, 645-47, 664-80; Ex.

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[26] Whereas the VRSC petitioners agree that the narrow tailoring inquiry examines the resources necessary for effective advocacy (Br. 29), the Randall Petitioners argue that any effort to "fine-tune" the limits is futile because *any* ceiling on expenditures will "necessarily restrict the spending of some candidates" and is therefore unconstitutional, Br. 37. This merely reiterates that spending limits are not subject to exacting scrutiny but are unconstitutional *per se*, to which Respondents already have responded. Under *Buckley*'s exacting scrutiny standard, the spending limits are subject to "closer scrutiny" than contribution limits, *McConnell*, 540 U.S. at 134; *Colorado Republican II*, 533 U.S. at 440; not automatic invalidation.

V:1686-1712, 1720-34; Tr. IX:226-28; Tr. X:18-20; *see also* Pet. App. 32a-33a, 100a.[27] Vermont candidates can communicate their messages to the public and run vigorous campaigns under Act 64's limits. The district court, which was closely familiar with local realities, so found after canvassing extensive evidence on Vermont campaigns and past spending patterns. App. 42a-44a.

The limits of Act 64 are tailored to local political conditions. With respect to the State Legislature, most candidates over the three election cycles prior to Act 64 spent less than the amounts allowed under the limits. Pet. App. 42a-43a.[28] In 1998, all categories of House candidates – incumbents, challengers, Democrats, Republicans, Progressives – spent less than the Act 64 spending limits on average. J.A. 88. Because Vermont House districts are so small, effective House campaigns have relied primarily on

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[27] The Vermont Legislature also created a mechanism for reviewing the limits through Section 23 of Act 64, which required two House and Senate committees to study the impact of Act 64 on the 2000 election cycle, "evaluate the effects of contribution and expenditure limitations and public financing on the election process," and report their findings to the General Assembly. *See* Ex. I:0105. Thus, had the expenditure limits not been enjoined, this review mechanism would have allowed legislative evaluation of how the limits operated in practice.

[28] Vermont House and Senate candidates generally do not advertise on television, because of the "lack of congruence between media markets and district boundaries." J.A. 42-43, *see also* Pet. App. 44a; J.A. 24-30 (plaintiffs' Responses to Requests for Admissions). Nor do most legislative candidates use paid campaign staff. J.A. 42-43; *see also* Randall Br. 9 (acknowledging that in legislative campaigns, use of mass media is generally limited to mailings and newspaper ads). Even when television is used, "primarily in campaigns for statewide office – it is relatively inexpensive compared to other states." Pet. App. 44a. Evidence showed that candidates could buy a thirty-second, prime-time, non-preemptible ad (the most expensive kind) on a network station for as little as $350. Ex. III:0873. Moreover, even legislative candidates can afford radio, direct mail and cable television advertising under Act 64's limits. Ex. IV:1402 (Brownell); Tr. IV:51 (Meub). A package of three thirty-second ads on CNN in Burlington during the most expensive time slot could be purchased for $45. Ex. III:0861.

direct contact between candidates and voters, including door-to-door campaigning, attending community events, and other methods of meeting voters. Tr. VII:16 (Young); Tr. IX:51 (Bristol); Ex. V:1825-1827 (Fiorillo); Tr. X:185 (Kitzmiller); Tr. IX:220-21 (Pollina); Tr. IX:129, 134-35 (Ready); Tr. II:17 (Berkey). Petitioner Brunelle distributed campaign literature by visiting all 2300 homes in his district in four days in each of his three House campaigns and said there was "no question in my mind" that the voters knew his views on the issues, although he never spent in excess of Act 64's limits. Ex. VII:2696, 2700.[29]

In the Senate, average spending by major party candidates was below the spending limits in all types of districts save for single-member districts. J.A. 87.[30] Overall, Senate incumbents spent more money than challengers in each of the three election cycles that were studied, and thus would be more affected by the limits than challengers. *Id.* Testimony by both Republicans and Democrats confirmed that Senate candidates can campaign effectively and get their messages out under Act 64's limits. Tr. VII:80 (Rivers); Tr.

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[29] Other witnesses who have run both as incumbents and challengers confirmed that candidates can run effective campaigns for the House under the limits. Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young). Petitioners cite testimony by Representative Neil Randall, an incumbent House member, that he planned to exceed Act 64's limits in order to run effectively for re-election. Randall Br. 9-10. While higher spending might well help Representative Randall fend off a challenger who would otherwise be able to outspend him under Act 64, that does not define the needs of a robust and effective campaign. *See also* Tr. IV:255-56.

[30] The most expensive district is Chittenden County, which includes Burlington and has six seats, but most successful Chittenden County candidates, both challengers and incumbents, spent less than or very close to the Act 64 limit of $16,500 (now adjusted upward for inflation). Ex. IV:1305-06, 1460. Republican challenger Peter Brownell testified that he ran an effective and winning Chittenden County campaign while spending only $11,000. Ex. IV:1349, 1353.

IX:134-135 (Ready); Tr. VIII:64 (Smith); Ex. IV:1359 (Brownell).

The VRSC Petitioners assert that an effective campaign by an "unknown challenger" requires $4,000 to $6,000 for a House seat and $30,000 to $50,000 for a Senate seat. Br. 42. But those figures are based solely on the testimony of Steve Howard, who, as a two-term House incumbent, *rejected* his challenger's request that the candidates abide by a voluntary spending limit. Representative Howard greatly outspent his challengers in his 1996 House race. Tr. IV:198-201. Nothing could illustrate better how high spending levels assist *incumbents* in defeating challengers. Moreover, Howard did not testify that effective Vermont Senate races generally required an expenditure of $30,000-$50,000, but only that *he* would have needed that amount *to defeat* his opponents in his own 1998 Senate race in Rutland County, Tr. IV:171 – an amount he was not even able to raise. Tr. IV:161. One candidate's testimony as to his own aspirational spending level does not establish the benchmark for narrow tailoring.[31]

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[31] In any event, the district court found more credible the testimony of another of Petitioners' witnesses, William Meub, who stated that he got his message out and ran a viable campaign for Senate in Rutland County in 1990 while spending $6,000-$7,000. Tr. IV:48-49, 51 (Meub). *See* Pet. App. 43a.

Petitioners' further claims, including their assertion that "Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998 (VRSC Br. 39), rely on the flawed analysis of an expert, Clark Bensen, which arbitrarily excluded all of the low-spending campaigns and was riddled with other errors and omissions. Mr. Bensen analyzed only one election year (1998), and omitted from his analysis, even in that year, 130 House candidates and 25 of the 70 Senate candidates, primarily those who spent the lowest amounts on their elections. Tr. III:90, 92. Mr. Bensen acknowledged that "as a data analyst" he "would much have preferred" to look at three election cycles, not just one. *Id.* at 90. He also admitted that he was inconsistent in his methods. He correctly subtracted from Governor Dean's expenditures a $218,000 donation he made to the Democratic Party, because Governor Dean did not spend those funds on his campaign.

With respect to statewide offices, the spending limits similarly will not impede effective campaigns. Indeed, no candidate for Governor, or indeed for any statewide office, chose to join the plaintiffs in challenging the limits.[32] Partly because television advertising is relatively inexpensive in Vermont, Pet. App. 44a, Vermont's gubernatorial campaigns are the second-least expensive in the nation. Tr. V:198-199 (Gierzynski). In the 1994-1998 period, only one candidate – incumbent Governor Dean, in 1998 – exceeded Act 64's limits. J.A. 84-86. A witness for Petitioners confirmed that Republican challenger Ruth Dwyer reached the voters and "did very well" in 1998, notwithstanding that she spent less than $253,000. Tr. IV:54 (Meub); J.A. 84.[33] Thus, the record does not support Petitioners' claim that $600,000 to $800,000 is the benchmark for an effective gubernatorial campaign. *See also* Tr. VIII:64-65 (Smith) (candidates can run effective campaigns for Governor under Act 64 limits); Tr. IX:233-34 (Pollina) (same); Pet. App. 43a (district court rejected testimony of Petitioners' witness that $800,000 to $1 million necessary for effective gubernatorial campaign).[34]

However, Mr. Bensen did not subtract similar donations by various other candidates when calculating their campaign expenditures. Tr. III:97-99. Thus, his report overstates the impact of Act 64's limits on such candidates. If a candidate is donating campaign funds to his party or to another candidate, the funds obviously were not needed to get the candidate's message out to the voters. *See also id.* at 112-14, 143-45 (acknowledging other mistakes and omissions).

[32] With respect to State Auditor only, which was subject to a $45,000 spending limit, Steve Howard claimed he would have considered a run but was discouraged by the limit, Tr. IV:177-78, but there is no evidence that he was capable of raising $45,000.

[33] In fact, the gubernatorial challengers in 1994, 1996, and 1998 all would have had *more* money to spend if Act 64 had been in place, because they could have received public financing of $300,000, an amount they were unable to raise through private donations.

[34] While Petitioners point to extra-record evidence of higher levels of spending in gubernatorial elections that occurred after the trial, the fact that a candidate spent more than the limit does not establish that effective campaigns cannot be conducted under the limit. For example, a state

The limits for other statewide offices also were tailored to allow adequate spending. Lieutenant Governor Douglas Racine testified before the Legislature that in his two bids for the office, "I found that I could run very effective campaigns, both of them, one was a losing effort, one was a winning effort, for $100,000. That's a lot of money." Ex. I:0267 (Act 64 limit was $100,000, now adjusted for inflation). The major party candidates for Lieutenant Governor spent just over $100,000 in two of the three election cycles prior to Act 64. J.A. 84-86. For statewide races below the level of Lieutenant Governor that were subject to a $45,000 limit under Act 64, the average spending by most categories of candidates was less than $30,000 in the three previous election cycles. J.A. 63. Of the few candidates for such offices who spent more than the limits, most were incumbents. J.A. 84-86.

Petitioners err in contending that the only relevant benchmark for effective campaign spending in legislative races is the handful of elections in one election year – 1998 – that were deemed "competitive" by Republican Party leaders and involved large expenditures. Naturally, the handful of highest-spending campaigns will be most affected by a spending limit, but that is nothing more than a tautology. It does not establish that spending in excess of the limits is necessary to run effective or competitive campaigns.[35]

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candidate's spending may reflect efforts to develop a fundraising network and a higher profile to assist later efforts to run for federal office, rather than any increased costs of communication. Because the facts relevant to understanding post-trial elections were not addressed through the adversary process at trial, those elections cannot properly be reviewed here.

[35] For example, four Vermont House challengers (Atkins and Cross in Chittenden 1-1, Hube in Windham 4, and Baker in Rutland 7) defeated incumbents while spending within Act 64's limits in 1998, and another four challengers (Fisher in Addison 2, Mann in Addison-Rutland 2, Lancaster in Windsor 2-1, and Kirchner in Rutland-Bennington 1) ran close races against incumbents while spending within the limits, yet Petitioners excluded all but one of those races in their list of

In fact, by focusing on only a tiny fraction of elections, Petitioners merely expose the poverty of their vision of electoral competition: one in which a handful of party leaders decide, before the campaign even begins, which small group of races will be important, while writing off any meaningful challenge to the incumbent in most races, including primaries. Vermont is not required to embrace such a distorted vision of democracy. A candidate field that has been so narrowed before a single vote has been cast is not the reflection of a healthy political system.

Moreover, the spending on "targeted" races clearly reflects the "prisoner's dilemma" described earlier – the fact that an opponent has an unlimited ability to raise funds. As Petitioners' witness explained: "[T]he other fear was . . . we did not know at the time . . . how much money the other challenger in the race, Judy Murphy, was going to spend. . . . [T]he fear was that there would be an extraordinary amount of money spent on her campaign through donations from outside Vermont." Tr. II:77 (McNeill).[36]

Petitioners' assumption that a spending limit, to be narrowly tailored, must be set at the highest amounts ever spent by past candidates, is arbitrary and has no more merit than deeming the lowest-spending campaign the benchmark. The evidence of Act 64's narrow tailoring properly includes (but was by no means limited to) examination of overall patterns of spending across elections.[37] That evidence was

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"competitive" elections. Ex. VII:2360-2375; Vermont Secretary of State, http://www.sec.state.vt.us/results (last visited Feb. 7, 2006).

[36] In fact, at least five Republican candidates McNeill identified as potentially harmed by spending limits actually lost their election in 1998 to candidates who *outspent* them. Ex. VII:2355, Col. H; Ex. VII:2358, Col. H.

[37] While Petitioners claim that pre-Act 64 spending figures do not include any of the items that would be considered "related expenditures" under 17 VT. STAT. ANN. § 2809, they ignore the fact that the definition of "expenditure" under former 17 VT. STAT. ANN. § 2801(3), similar to Section 2809, specifically encompassed payments by "any person, committee or group authorized by a candidate" to make an expenditure.

buttressed by individual testimony of knowledgeable Vermont witnesses (including some of Petitioners' witnesses) confirming that the limits permit effective campaigns.[38]

Nor does the narrow tailoring requirement require Vermont to specify separate expenditure limits for primary and general elections. Other states similarly apply campaign finance limits without distinguishing between primary and general elections. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 13-226(b) (2006); HAW. REV. STAT. § 11-191, § 11-204(a) (2006); Wisconsin State Elections Board, Contribution Limits: Candidates for State Office 65 (2004), *available at* http://elections.state.wi.us/docview.asp?docid=1818 (last visited Feb. 7, 2006). Furthermore, in Vermont the primary is held very close to the general election – only two months apart – engendering more of a unified campaign season, which often works to the advantage of a candidate who has run in a successful primary. Pet. App. 60a; Tr. VI:85-86; Tr. VIII:71-72 (Smith). Rather than specifying one limit for the primary and another for the general election, the Vermont Legislature established the overall amount needed and gave candidates the flexibility to determine how to divide their spending. Tr. X:224-25 (Kitzmiller).

Finally, the fact that the limits apply to candidates who are entirely self-funded does not prevent the limits from being narrowly tailored.[39] While Petitioners argue that

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VT. STAT. ANN. tit. 17, § 2801(3) (amended 1997). Thus, there is clearly some overlap. Moreover, unlike the previous definition of expenditure, Act 64's "related expenditure" provision *expressly excludes* from the candidate's spending total all coordinated expenditures of less than $50, *id.* § 2809(b), as well as any expenditure of less than $100 for refreshments and related supplies at an event held to allow a candidate to meet personally with a group of voters, *id.* § 2809(d).

[38] Ex. VII:2700 (Brunelle); Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young); Tr. VII:80 (Rivers); Tr. IX:134-135 (Ready); Tr. VIII:64-65 (Smith); Ex. IV:1353, 1359 (Brownell); Tr. V:50-51 (Hooper); Tr. IX:233-34 (Pollina).

[39] None of the candidate-petitioners has alleged that he could finance a campaign in excess of Act 64's limits while relying solely on his own

spending by such candidates cannot implicate corruption or time-protection interests, campaign finance limits must apply even-handedly. A system in which most candidates face limits while a few remain free to spend unlimited amounts from their personal fortunes would raise the spectre of discrimination and would be unlikely to win public acceptance. *See* Blasi, *supra*, at 1316. If a limit on candidates' spending is otherwise supported by compelling interests, it is not unconstitutional merely because it brings within its scope some instances of spending that are less likely to pose the dangers that prompted the law. *Buckley*, 424 U.S. at 35 (upholding contribution limits although not all large contributions cause corruption).[40]

2. Less Restrictive Alternatives Are Not Available.

The Second Circuit's remand order requires Respondents to show not only that the spending limits chosen by Vermont permit effective campaigns for office, but also directs the district court to determine whether a system of voluntary spending limits with public financing would equally serve the State's interests. Pet. App. 157a-164a. To be effective, the alternative must be both plausible and feasible. *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004); *United States v. Playboy Entm't Group*, 529 U.S. 803, 815-16 (2000).

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financial resources. Accordingly, none has standing to allege that the limits are unconstitutional as applied to self-funded candidates.

[40] *Amicus* RNC argues that Vermont's spending limit is not narrowly tailored to address the State's time-protection interest because it limits candidates' spending, but does not specifically bar candidates from raising funds in excess of the spending limit. But Vermont certainly could assume that if candidates are limited in the amount they can spend, few if any will see any purpose to raising funds in excess of the limit. In past elections, when candidates have raised more than they spent, it was under a system in which no candidate knew, at the outset, what a potential opponent might be able to spend. If Vermont finds, after experience with spending limits, that candidates habitually are raising more than they are able to spend, the State can always add a provision specifically limiting the amount a candidate can raise.

Plainly, a voluntary system of expenditure limits with public financing is not an effective alternative, because in any given election any candidate who chooses to decline the public funding can thwart the compelling governmental interests served by spending limits.[41] Moreover, if a state has to set the public financing amounts high enough to assure that no non-participating candidate, no matter how well funded, would ever outspend a participating candidate, the system is unlikely to be feasible. Accordingly, no remand is required.

The Second Circuit's remand order also requires Respondents to show that higher limits would not effectuate the State's interests. Pet. App. 161a-64a. Petitioners have not sought to support that aspect of the Second Circuit's narrow tailoring inquiry. Because the spending caps allow ample communication and effective campaigning, they are "precisely targeted to eliminate" the problems that the statute sought to address without inhibiting political discussion and debate. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). Under these circumstances, an increase in the limit would be "a difference only in degree, not a less restrictive alternative in kind." *See Burson v. Freeman*, 504 U.S. 191, 210 (1992) (plurality opinion) (holding that prohibition on electioneering within one hundred feet of polling place satisfied exacting scrutiny without a showing that the one-hundred-foot boundary was "perfectly tailored"). The limits therefore satisfy the narrow tailoring requirement, and no remand is necessary.

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[41] Indeed, Act 64 provides public financing for the Governor and Lieutenant Governor races, and Vermont thus has had a *de facto* voluntary financing system since 2000, when the mandatory limits were enjoined by the district court; yet no major party candidate in the last two election cycles has chosen voluntary public financing. The collapse of the presidential public funding system in the primary election in 2004 is further evidence of the problem. *See* Briffault, *Return of Spending Limits*, *supra*, at 424-25; *see also* Alexander, *supra*, at 54-58 (explaining why voluntary public financing system is not a feasible less restrictive alternative for protecting officeholder time).

Finally, Petitioners' own proposals are contradictory and self-defeating. When Petitioners argue simultaneously that Vermont's anti-corruption interests are adequately served by lowering the contribution limits, Randall Br. 12, 35, but that the time-protection interest would be served by raising or eliminating the contribution limits, *id.* at 33-34, it is evident that they can offer no feasible alternative to spending limits.

D. As an Alternative, Buckley's Application of Exacting Scrutiny Warrants Reexamination.

In the event that the Court concludes, contrary to the foregoing, that Vermont's expenditure limits do not satisfy the requirements of strict scrutiny, sound reasons exist to revisit the applicable standard of review. For the reasons set forth in Part II of the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, which Respondents join, a test that balances the constitutional interests served by spending limits against any burdens such limits may impose on protected speech is appropriate when, as here, "constitutionally protected interests lie on both sides of the legal equation." *Shrink*, 528 U.S. at 400 (Breyer, J., concurring).

The Court may also uphold Vermont's expenditure limits as a content-neutral regulation of speech.

> The principal inquiry in determining content neutrality, in speech cases generally . . . , is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Ward, 491 U.S. at 791 (1989) (internal citations omitted). A content-neutral law is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of information. *Id.*;

see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

Ward's emphasis on a regulation's justification is significant because it specifically incorporated the analysis derived from *Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986), into the general test for content-neutrality. *See Ward*, 491 U.S. at 804 n.1 (Marshall, J., dissenting). In *Renton*, the Court upheld as content-neutral an ordinance aimed at theatres that showed movies with adult content, 475 U.S. at 43, because the ordinance aimed "at the *secondary effects* of such theaters on the surrounding community," *id.* at 47, and was thus "*justified* without reference to the content of the regulated speech." *Id.* at 48-49 (internal quotations omitted).[42]

Act 64's expenditure limitations meet the standard for content-neutrality outlined in *Ward*. They were not adopted because of disagreement with the message conveyed, and they neutrally apply to all candidates. *See also Buckley*, 424 U.S. at 39 (characterizing FECA's spending limits as "neutral as to the ideas expressed"). Of six legislative findings specific to the issue of spending limits, two relate to preserving the time of officeholders and candidates, J.A. 20 (Sec. 1(a)(1), (2)), four relate to avoiding corruption and the appearance thereof, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), three relate to promoting electoral competition, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), and one relates to democratizing the influence of money on politics, J.A. 20 (Sec. 1(a)(1)). The "predominate concern" of the Vermont Legislature clearly was not the suppression of particular views. *See*

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[42] Contrary to Petitioners' reliance on *Burson*, 504 U.S. at 197 (plurality), this Court has repeatedly reaffirmed that the government's purpose in enacting a regulation is the touchstone for determining content neutrality. *See Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-96, 310 (2000) (plurality and Souter, J., concurring in part and dissenting in part); *Turner Broadcasting*, 512 U.S. at 642; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991).

Renton, 475 U.S. at 47-48 (examining "predominate concerns" of law); *see also City of Erie*, 529 U.S. at 292 (one legitimate purpose sufficient for determination of content neutrality); *Turner Broadcasting*, 512 U.S. at 646 (examining "overriding objective" of Congress to determine content neutrality).[43]

The application of spending limits only to candidates (and not to other individuals or groups) similarly does not "reflect the Government's preference for [or aversion to] the substance of what the . . . speakers have to say." *Turner Broadcasting*, 512 U.S. at 658. Vermont's spending limits were enacted to preserve *officeholders*' and *candidates*' time and to prevent the corruption or appearance of corruption, interests that would not be served by application of the spending limits beyond candidates. *Simon & Schuster*, 502 U.S. at 122 n.* (statutes may be content neutral despite "incidental effects on some speakers but not others"). The fact that a burden falls upon political speech does not mean that the burden is more than incidental. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.23, 817 (1984). Moreover, even a law that directly regulates speech activity may be subject to intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 213-214 (1997).

Vermont's content-neutral spending limits further substantial governmental interests and those interests are

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[43] To the extent *Buckley* implicitly suggests that expenditure limits are not content-neutral, that conclusion was based on the specific "equalization" interest asserted in support of the spending limits in FECA and is not applicable to Vermont's candidate spending limits, which rest on distinct interests. *Compare Simon & Schuster*, 502 U.S. at 126 (Kennedy, J., concurring in the judgment) (describing *Buckley*, in part, as "striking down content-neutral limitations on financial expenditures") *with Turner Broadcasting*, 512 U.S. at 657-58 (characterizing independent expenditure limitations in *Buckley* as content-based to the extent they were justified on equalization grounds).

unrelated to the suppression of free expression. *See supra* Part I(B). Given the findings of both courts below that Vermont's spending limits fully permit candidates to communicate their ideas to the voters and run effective campaigns, Pet. App. 42a-44a; *id.* 152a-57a, the record here demonstrates that the burden on speech is only incidental. *See supra* Part I(C)(1). This finding is in contrast to FECA's spending limits, which "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19.

It is for this reason, as well, that the spending limits leave open ample alternative channels of communication. That is implicit in the fact that Act 64 establishes a limit, not a ban, on campaign spending, and allows for spending at levels which candidates in the past have found wholly adequate for their campaigns. *See Ward*, 491 U.S. at 802. The incidental burden is "no greater than . . . essential" because Vermont's spending limits promote "substantial government interest[s] that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675 (1985).[44]

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[44] Because Vermont's spending limits are constitutionally permissible based on the interests canvassed *supra* at Part I(B), the Court need not revisit *Buckley*'s conclusion that the interest in equalizing the ability to influence elections does not justify expenditure limits. Nevertheless, Respondents agree with those *amici* who contend that an interest in equality is sufficiently compelling to satisfy strict scrutiny review. *See* Br. of *Amici* States and Br. of Equal Justice Society *et al.* When the political marketplace becomes the special province of the winners in the economic marketplace, *Buckley*'s very goal of securing "'the widest possible dissemination of information from diverse and antagonistic sources' " in political campaigns, 424 U.S. at 49 (citations omitted), is defeated. A spending limit that encourages broader participation while permitting candidates to amass the resources they need for effective advocacy of their views thus furthers, rather than restricts, First Amendment goals. *See Shrink*, 528 U.S. at 401 (Breyer, J., concurring) (citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

To the extent the Court also views *Buckley* as precluding the constitutionality of spending limits based on any of the interests discussed

II. The Second Circuit Correctly Rejected Petitioners' Challenges To Vermont's Regulation of Campaign Contributions

This Court in *McConnell* and *Shrink*, applying its prior ruling in *Buckley*, upheld limits on contributions to electoral candidates on a standard that defers to the expertise of elected legislators. The Second Circuit in this case correctly applied this Court's precedents in upholding contribution limits tailored to the particular circumstances of Vermont's electoral environment.[45] Petitioners' claims are a reprise of arguments repeatedly rejected by this Court, and should once again be rejected.

This Court has consistently upheld contribution limits against First Amendment challenges. *McConnell*, 540 U.S. at 224; *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *Shrink*, 528 U.S. at 395-96; *Buckley*, 424 U.S. at 29. Under this Court's precedents, such limitations are not subject to strict judicial scrutiny. Rather, legislatures may regulate contributions to combat corruption and the appearance of corruption in electoral politics unless the restriction is "so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" *Shrink*, 528 U.S. at 397 (quoting *Buckley*, 424 U.S. at 21). The question under the First Amendment is whether the legislative measure is "so radical" in effect as to render "political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Courts have no "scalpel to probe" the amount at which a contribution limit should be set to achieve its purpose. *Buckley*, 424 U.S. at 30; *Shrink*, 528 U.S. at 388

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supra at Part I.B, Respondents respectfully request that the Court revisit *Buckley* in that regard.

[45] Candidates for State Representative or local office may accept up to $200, candidates for State Senate or county office may accept up to $300, and candidates for statewide office may accept up to $400. 17 VT. STAT. ANN. § 2805.

("[T]he dollar amount of the limit need not be 'fine tun[ed].'") (quoting *Buckley*, 424 U.S. at 30).[46]

Substantial deference is owed to legislative determinations regarding contribution limitations, as legislators are far more familiar with varying local political conditions that determine whether a limit is appropriate. *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."). The legislature accordingly is not required to compile a detailed evidentiary record justifying the particular lines it draws. *See Shrink*, 528 U.S. at 393.[47] "[D]ifferences in [the] level [of contribution limits] from state to state should reflect democratic choices, not court decisions." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000) (internal quotations omitted).

The lessened standard of First Amendment scrutiny applicable to limitations on contributions also reflects the minimal effect of such limits on associational and speech

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[46] *Shrink* thus rejects the view of certain lower courts (*Day* v. *Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994); *Russell* v. *Burris*, 146 F.3d 563, 571 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998)) that *Buckley* applied a narrow-tailoring standard to contribution limits.

[47] Contrary to this settled law, Petitioners would require extraordinary evidentiary showings by legislatures. In arguing that a legislature must present hard "evidence of pre-access demands for contributions conditioned on granting access," VRSC Br. 10, Petitioners conflate "activities which arouse suspicions," *Shrink*, 528 U.S. at 390 (internal quotations omitted), with evidence of actual corruption, an approach that would render meaningless the substantial government interest in combating the appearance of corruption, *e.g.*, *Shrink*, 528 U.S. at 389 (upholding Missouri contribution limits adopted to combat what the public perceived as "politicians too compliant with the wishes of large contributors"). Petitioners similarly ignore *Shrink* by arguing that there was "no evidence at trial that [pre-Act 64] limits failed to deter corruption." Randall Br. 20. This is untrue (*see infra* this Part), but even if it were not, it ignores that the Vermont Legislature has a compelling interest in combating the *appearance* of corruption.

rights. *McConnell*, 540 U.S. at 137, 141; *Shrink*, 528 U.S. at 386-388; *Buckley*, 424 U.S. at 20-26. *Cf.* Pet. App. 42a (even "[s]mall donations are considered to be strong acts of political support in this state"). It also reflects the vital governmental interests furthered by contribution limits: deterring corruption, preventing the appearance of corruption, and assuring public confidence in government. *McConnell*, 540 U.S. at 143-45; *Beaumont*, 539 U.S. at 154; *Shrink*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28.

This Court accordingly has sustained two federal contribution limitation schemes in *McConnell* and *Buckley*. In *Shrink*, it also rejected a First Amendment challenge to a Missouri statute that included $1,075 contribution limits for statewide offices. 528 U.S. at 384-85. Relying on *Shrink* and *Buckley*, courts of appeals repeatedly have rejected challenges to state contribution limits set at varying levels.[48]

The Vermont Legislature determined that its limitations were appropriate to the unique circumstances of the state after months of painstaking deliberation and hearing testimony from 145 witnesses. Ex. I:0187 *et seq.*; Ex. II:0412 *et seq.* In addition, at trial, numerous witnesses testified that, under the limits in place prior to Act 64, candidates' reliance

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[48] *See Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1088, 1092 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004) ($400 per election for Governor and Lieutenant Governor, $200 for other statewide offices and $100 for any other public office); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002) ($300 per election for at-large elections and Mayor and $100 for ward elections), *cert. denied*, 537 U.S. 1160 (2003); *Daggett*, 205 F.3d at 452, 459 ($500 for Governor and $250 for all other candidates; $500 and $250 limits for PACs, committees, corporations, or associations); *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000) ($525 per election for State Senator or other office with electorate of 100,000-250,000, and $275 for State Representative or other office with electorate below 100,000). *See also Fla. Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256, at *3, *5, *7 (M.D. Fla. Mar. 20, 2000) ($500 per contested election for legislative elections in which candidates spend average of $108,000 for House seats and $250,000 for Senate seats).

on large campaign contributions continued to undermine public confidence in Vermont's political system.[49] This testimony included the observations and experiences of several current and former state officeholders.[50] Several of Petitioners' own witnesses testified to the same effect. Pet. App. 36a-37a; *see also* Tr. IV:66-72 (Meub); Tr. II:207 (Patch); Tr. IV:220 (Howard); Tr. IV:259 (Randall); Ex. VII:2706 (Brunelle); Tr. III:25-26 (Kuusela). *See also* Pet. App. 37a (district court finding that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence").

The district court further found that the contribution limits adopted by the Legislature were calibrated to address donations "considered suspiciously large" by the Vermont public, and that gave rise to the corrosive perception of corruption. Pet. App. 59a. *See* Tr. VII:18-21; Tr. VII:80; Tr. IX:226; Tr. VIII:23-24; Ex. III:0747, 0757, 0783-0784, 0791-0793, 0798, 0804 (newspaper articles indicating public suspicion resulting from large contributions permitted under previous contribution limits). Many of Petitioners' own witnesses testified to that public perception. *See* Tr. IV:254 (Randall) ($1,000 contribution from an individual could give appearance that candidate was bought or owned by contributor); Tr. III:25 (Kuusela); Ex. VII:2672-73 (Landell); *see also* Tr. II:201 (Patch) (contributions over one hundred dollars are very large).[51] Indeed, under Vermont's prior

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[49] *See* Tr. VII:147-57; Tr. IX:175-76, 193-98; Tr. V:183-84; Tr. VIII:23-26, 28-38; Tr. IX:56-58; Tr. X:162-63; Ex. V:1843-44, 1847; Tr. VII:41-42.

[50] Tr. X:161-62 (Kitzmiller); Tr. VIII:23-26, 39-40 (Smith); Tr. IX:56-58 (Bristol); Tr. VII:41-42 (Young). This included testimony linking donations to specific legislative actions. *See* Tr. VII:72-74 (Rivers on favorable treatment given to donor seeking tax exemption); Tr. V:55-56 (Hooper).

[51] Petitioners cite polling numbers purporting to show that the public associates corruption only with much larger amounts such as $20,000. VRSC Br. at 9 n.6. The numbers cited, however, were not from a poll of Vermonters, but from a national poll. Tr. VI:135.

limits of $2,000 per election cycle, a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign. J.A. 87-88 (average House campaign spent less than $2,000 and State Senate campaign averaged less than $7,500).

Senator Rivers acknowledged that she gave special consideration to a donor who had contributed between $500 and $1,000 in past campaigns when the donor sought a tax exemption. Tr. VII:72-74. Senator Ready testified that slate industry donors who made $500 donations appeared to get preferential consideration in a development permit law. Tr. IX:88-95, 100-04; Ex. III:0787; Ex. V:1765; Tr. V:23-30; *see* Tr. VII:42 (Young) ($1,000 contributor will be "listened to"). In light of the evidence, the district court properly concluded, applying *Shrink*, that Act 64's lowered contribution limits were appropriate in the circumstances of Vermont, Pet. App. 55a-62a, and the court of appeals was unanimous in affirming that conclusion, Pet. App. 168a-171a, 194a. Petitioners' argument that Vermont is obliged to make a greater evidentiary showing because its limits are supposedly "exceedingly low" (Randall Br. 44) ignores the body of evidence establishing that the limits are in fact both calibrated to the context of Vermont and accord with the perception of the state's citizens.[52]

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[52] Petitioners' *amici* claim that Act 64's contribution limits improperly seek to equalize access to candidates and officeholders in a manner inconsistent with *Buckley*. Br. of *Amicus* Center for Competitive Politics 12-16; *see also* Br. of *Amicus* Sen. McConnell 13 -18. *Amici*'s analysis is suspect. Certainly, a system in which access is for sale is troubling at least in part because citizens stand on a vastly unequal footing in their ability to secure a politician's responsiveness in that manner. But that does not mean that the goal of deterring corruption and undue influence is somehow tainted by the reality of voters' unequal giving power. To the contrary, *Buckley* and subsequent cases recognize that government has a compelling interest in deterring the threat of "politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389; *see Buckley*, 424 U.S. at 28 (government entitled to address the "attempts of those with money to influence governmental

Nor do Vermont's limits impede effective advocacy. As discussed *supra*, under *Shrink* and *Buckley*, contribution limits that advance the State's anti-corruption interest are valid unless they produce a "dramatic[ally] adverse effect on the funding of campaigns." *Shrink*, 528 U.S. at 395. The district court, relying on substantial evidence in the record, properly held that Act 64's individual contribution limits had no such effect. The court relied on testimony from a substantial number of witnesses, including state legislators, candidates, and campaign consultants, and on witnesses who had already conducted political campaigns under the Act's contribution limits. That finding is entitled to deference. *Shrink*, 528 U.S. at 396.

The district court's findings reflect Vermont's small population and intimate campaigning style. Vermont is the second-smallest state in the Union in terms of its population. In contrast, Missouri, whose contribution limits this Court approved in *Shrink*, has close to ten times as many people as Vermont.[53] It is predictable, therefore, that campaigns in Vermont would be significantly less expensive than in other parts of the country.

Partly due to the "relatively inexpensive cost of television advertising in the state," statewide candidates can raise sufficient funds to effectively advocate under Act 64's contribution limits. Pet. App. 155a (citation omitted). Even under Petitioners' inflated benchmark for an effective gubernatorial campaign by an unknown challenger, VRSC

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action" through broader means than anti-bribery laws). Vermont citizens were rightly troubled when their Governor admitted that "money does buy access," Ex. III:0902, and nothing in *Buckley* or subsequent cases calls into question the propriety of responding to that concern.

[53] *See, e.g.*, U.S. Census Bureau, State & County Quickfacts (Missouri), http://quickfacts.census.gov/qfd/states/29000.html (last visited Feb. 3, 2006) (Missouri population is 5,595,211); U.S. Census Bureau, State & County Quickfacts (Vermont), http://quickfacts.census.gov/qfd/states/50000.html (last visited Feb. 3, 2006) (Vermont population is 608,827).

Br. 42, a candidate could raise the funds with $400 donations from 1500-2000 individuals or entities, a number equal to less than .33% of Vermont's population (and donors are not required to be from Vermont). If spouses each contributed the maximum, donations from 750-1000 households would suffice. As the evidence canvassed at Part I(C)(1) establishes, effective campaigns can in fact be conducted with far less spending than the amounts suggested by Petitioners.

Senate and House candidates also can raise sufficient funds for their campaigns under Act 64's limits, as the district court expressly found. Pet. App. 40a. The average Senate campaign of less than $7,500, J.A. 87, would require only twenty-five donations. Even at five times the average, the campaign could be funded with 125 donations of $300 (assuming the candidate contributed no funds of her own). In House races, which averaged under $2,000 in spending, J.A. 88, ten $200 contributions would suffice, and at five times that amount, fifty donations would be needed. Evidence from the 1999 Burlington mayoral contest, held under Act 64's $200 limit, showed that both candidates ran fully effective campaigns; even the losing candidate, the court noted, "[b]y his own statements, [had run] an effective campaign." Pet. App. 41a.

Despite the district court's findings, supported by a substantial record, that candidates can advocate effectively under Act 64's contribution limits, Petitioners assert that Vermont's limits impermissibly fail to focus on a small group of "targeted" races. This Court's precedents impose no such requirement. In calibrating its regulation of contributions to ensure that candidates remained able to advocate effectively, the Legislature looked to historical contribution patterns in Vermont, including "cost-per-voter statistics, the level of limits that have survived constitutional challenge elsewhere, the experiences of persons running for office, costs of campaigning, types of campaigns, history of reform, and media reflection of general public sentiment." Pet. App. 56a-

57a. That is comparable to the methodology employed in *Buckley* and *Shrink*, in which this Court approved a broad examination of previous elections in order to assess the likely impact of limits. *Shrink*, 528 U.S. at 395-97; *Buckley*, 424 U.S. at 22 n.23, 26 n.27. Moreover, the contribution limit this Court approved in *Buckley* applied to every federal election, from North Dakota to New York, regardless of the competitiveness or cost of elections in the relevant jurisdiction.

More broadly, Petitioners' approach of setting limits based on the most expensive elections would frustrate Vermont's anti-corruption interest. If Vermont were to set its contribution limits based on the most expensive races highlighted by Petitioners, candidates in the less costly elections could finance their entire campaigns with only a few contributions. Consequently, if Petitioners' rule were adopted, Vermont would be forced to allow corruption or its appearance to infect nearly all of Vermont's legislative races. Consistent with *Buckley* and *McConnell*, this Court should not hamstring the Vermont Legislature by adopting Petitioners' rule.

Petitioners contend that Act 64's contribution limits preclude effective advocacy by challengers. This Court has already rejected nearly identical arguments. *Shrink*, 528 U.S. at 389 n.4 (noting that "*Buckley* squarely faced" such claims). The trial record in this case confirms this Court's understanding. Professor Gierzynski found no systematic difference between the effect of Act 64's contribution limits on incumbents and non-incumbents. J.A. 51-52. In nearly every legislative race that Gierzynski examined prior to the Act's taking effect, either incumbents had raised more money in amounts over the limits than had challengers or the difference was minimal. *Id.* 72, 75.

Further, both Petitioners' and Respondents' witnesses testified that incumbents have greater access to large contributors than do challengers. Tr. IX:127 (Ready); Tr. IV:252 (Randall). Empirical studies of state contribution

limits support this conclusion.[54] The record evidence thus accords with *Buckley*'s observation that a contribution limit would have "the practical effect of benefiting challengers as a class" to the extent incumbents are more likely to attract large contributions. *Buckley*, 424 U.S. at 32.

Further undermining the claim that campaign reforms inherently reflect incumbent self-dealing is the fact that contribution limits have been enacted in many jurisdictions not by the legislature but by referenda and initiative, and are often challenged by the very incumbents whom such limits are alleged to benefit. *Shrink*, 528 U.S. at 382 (observing that Missouri reform law with lower contribution limits was enacted by initiative and later replaced by legislative enactment containing higher limits); *Eddleman*, 343 F.3d at 1087 (reform law approved by voters); *City of Akron*, 290 F.3d at 815-16 (reform law approved by voters; two incumbent city council members sued); *Daggett*, 205 F.3d at 450, 472 (reform law approved by voters; plaintiffs challenging law included incumbent State House and Senate representatives).[55]

CONCLUSION

The decision below should be affirmed to the extent it upheld Act 64's limits on contributions by individuals, parties, and political committees, and its presumption treating certain expenditures by political parties and committees as "related expenditures." It should also be affirmed to the

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[54] Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, POL. RES. Q. (forthcoming 2006), manuscript at 1, *available at* http://www.uky.edu/~keom0/paper/disparity_Eom.pdf (last visited Feb. 7, 2006) (if anything contribution limits can work to reduce the bias that traditionally works in favor of incumbents).

[55] Petitioners join the more extensive discussion of Act 64's contribution limits, and its separate discussion of the Act's political party limits and rebuttable presumption of coordination, set forth in Parts III, IV, and V of the Sorrell Brief.

extent it held that Vermont's expenditure limits are supported by compelling governmental interests. The decision below should be reversed to the extent it ordered a remand to the district court for further consideration of whether the spending limits are narrowly tailored, and the Second Circuit should instead be instructed to enter judgment for Respondents, Cross-Petitioners as to the constitutionality of Vermont's spending limits. In the alternative, if the Court determines that additional factual development is necessary to determine whether the spending limits are appropriately tailored, the Court should affirm the judgment remanding that issue to the district court.

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In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM SORRELL, *et al., Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply Brief for Petitioners Vermont Republican State Committee, et al.

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Argument

I. The State Has Failed To Demonstrate a Corruption Problem in Vermont That Would Justify Such Low Contribution Limits.

The State correctly points out that "[t]he gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." Sorrell Br. 30 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950). Here, however, the contribution limits fail this test, since the gravity of the evil, corruption, when discounted by its probability, which the record has shown is non-existent, makes Vermont's exceedingly low contribution limits wholly unnecessary.

The State presents a few instances which they erroneously claim shows perceived undue influence of contributions, and no evidence of any actual corruption. Instead, Respondents' Briefs are filled with general, conclusory statements and hyperbole and cite not one witness who is able to name a specific officeholder corrupted by low contributions. Instead, the evidence shows that Vermont is considered a "clean" state in regard to elections and is certainly not the most corrupt state in the Nation that would be necessary to justify the lowest contribution limits in the country.

Because of this lack of actual evidence, Respondents attempt to bolster their claim by two techniques, by repetition and by intermingling the sparse trial testimony with numerous citations to newspaper articles[1] and

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[1]The mere fact that a reporter or editor publishes an article alleging corruption does not prove that there is even a reasonable perception that such corruption exists.

> If we were to allow the charges of journalists automatically to create a presumption that corruption exists or that people believe corruption exists, a group of writers, no matter how unlikely the tales they tell, could rescue statutes otherwise

to various exhibits containing out-of-court statements not subject to cross-examination. Such non-sworn-to material should be given little weight in determining whether Vermont is a state plagued by corruption and should not be allowed to substitute for the proof the State is obligated to present. This lack of proof occurs in spite of the fact that Vermont was then operating under the prior, much larger, $2000 per election cycle contribution limits. It follows, then, that the State has not shown that the new $200-400 contribution limits are justified. In any event, Vermont is only claiming "privileged access" and the record shows that all Vermont citizens enjoy access to their elected officials, so there is nothing "privileged" about it.

A. The specific examples Respondents cite in an attempt to show corruption are merely broad allegations that prove nothing.

Respondents cite a seemingly impressive array of legislative misconduct, made to appear more impressive because the examples are cited repetitiously throughout their Briefs. A closer look at these few instances (and they are all strikingly similar in their lack of substance) reveals that they are nothing more than unfounded allegations of wrongdoing. For instance, the State's oft-repeated tobacco check example, Sorrell Br. 3, 6, 19, 21,

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abridging the free speech of those not employed by traditional, established media outlets. This cannot be the law.

Democratic Party of United States v. National Conservative Political Action Committee, 578 F. Supp. 797, 831 (D. Pa. 1983).

If newspaper articles alone suffice to show a problem with corruption or even the appearance of corruption, then "the appearance of corruption is not merely a blank check, but an endlessly refilled bank account for those who seek greater regulation." Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, CATO Supreme Court Review, 2002-2003, at 187, 200.

consists of tobacco checks in the amount of *$40* given to officeholders *after* defeat of a tobacco-related bill. Tr. VII-63. This utterly fails to prove corruption; rather, it is an example of a well-known political truth – contributors give to candidates with whom they agree. As Representative Karen Kitzmiller complained, "the tobacco industry . . . freely give[s] contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). If this is corruption, then candidates will be forced to accept contributions only from those with whom they disagree, with a resulting shortage of likely donors. Furthermore, contributions of $40 remain lawful even after the imposition of Vermont's "laughably low" limits, so the contribution limits do not solve this "problem" of contributors donating to candidates who support their views. Moreover, no regulation can prevent this "problem," unless contributions are outlawed altogether.

Another example the State offers as "proof" of corruption is the bottle bill vote. Sorrell Br. 2, 6, 19, 44; VPIRG Br. 12. For all of the discussion and citations to the incident, however, the worst Senator Ready could testify to was that bottle industry contributors were "trying to dispose party leadership and the people who are running for office in a friendly way toward their issue." Tr. IX-109. The bill did not pass and an old farmer, one of her constituents, called to tell her he could not believe it was not passing. It was "frustrating" to him. Tr. IX-110. Finally, Alice Bassett stated that the bottle bill "got nowhere" and that the wine lobby was too strong, but when questioned about whether the wine lobby had actually contributed to any members, she said, "I can't say that they were paid. They probably were not." Ex. II, E-0426.

Senator Ready testified about the slate quarry exemption matter, Sorrell Br. 3, 6, 20, 45; VPIRG Br. 12,

44, and in at least 19 pages of testimony, as to the $500 contributions only found it "odd" that committee members studying the issue would be given contributions by quarry owners. She conceded that the officeholders were not corrupt – "I can tell you [members of the committee studying the issue] John Bloomer, Curt McCormack, none of these people is for sale. They are people that have distinguished records, and a high moral standard." Tr. IX-94-95. "And I want to be very, very clear that I am not saying here that senator A, B, C, or D or representative A, B, C or D took money and therefore had a specific vote." Tr. IX-104.

The State also points to a vote on a bill that would have allowed optometrists to administer eye drops. Sorrell Br. 19; VPIRG Br. 12-13. The State quotes Peter Smith bemoaning the fact that "there were lobbyists and individual doctors . . . all over the statehouse." Tr. VIII-41. Smith admitted that he did not know specifically of any contributions given to senators over the eye drop issue, nor did he recall receiving such contributions himself around the time of the vote and said he voted his conscience. Tr. VIII-86-87.

Instead of evidence of perceived or actual corruption, the Respondents' Briefs are full of conclusory statements and hyperbole. For instance, the State claims that Plaintiffs' witnesses "recognized the public's concern over the corrupting effect of money in politics." Sorrell Br. 7. What the State fails to explain is that William Meub, the one witness cited by the State for that proposition, testified that the public might perceive such a problem with contributions of "an *unlimited* amount." Tr. IV-66-67 (emphasis added).

None of the incidents cited establishes the existence or even the perception of corruption. Thus, the State has failed to meet its burden to show that prevention of real or apparent corruption is a compelling interest in Ver-

mont that would justify such low contribution limits.

B. The record demonstrates that, without evidence, corruption from such low contribution limits should not be presumed.

Without record evidence of corruption resulting from contributions this low, corruption should not be presumed. The relationship between contributions and corruption continues to be controversial. Stanley C. Brubaker, *The Limits of Campaign Spending Limits*, 133 Public Interest 33, 46 (1998) ("[P]olitical scientists consistently find that the interests of constituents, the concerns of political parties, and the politician's philosophy have more influence on how he votes than do mere campaign contributions."). "Literally decades of studies have consistently failed to find evidence that campaign contributions purchase special favors on any type of systematic basis." Smith, *supra*, at 187, 197-98 (citing Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. Econ. Perspectives 105, 113, Table 1 (2003) (summarizing results of 36 major studies)). "Supporters of the 'contributions as corruption' thesis continue to produce anecdotal evidence of specific episodes of 'corruption.'" *Id.* at 198 (citation omitted). "Anecdotal evidence, however, is generally viewed by the Supreme Court as inadequate to support the infringement of a fundamental right such as speech." *Id.* (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 370 (2001)).

Dr. Lott, Yale University Law School research scholar with a Ph.D. in economics, has written over ten papers on the topic of why incumbent politicians vote the way they do. Tr. III-170. He testified that there is "basically no effect" of contributions on the voting patterns of incumbent officeholders from contributions largely in the $30,000 range. Tr. III-176. He studied 980 congressmen over a period of 15 or 16 years. Tr. III-175. He researched

how those politicians voted during their last term in office when they were not faced with the threat of losing contributions if they voted against the wishes of their contributors, and whether they voted differently than they had previously. Tr. III-172-73. He controlled for whether the incumbent was running for a different office, would be engaged in lobbying, was up for a government appointment, and even whether an officeholder's child was involved in political activity or lobbying. Tr. III-173. His conclusion was that politicians leaving office "continue to vote exactly the same way as they did previously." Tr. III-173. Other papers that have studied the effect of contributions on voting behavior have looked only at correlation, not causation. Tr. III-178.

C. Officeholders in Vermont freely give access to their constituents.

Access is freely given to Vermont citizens. State witness Sen. Ready is an excellent example. She is so accessible that she even has people come into her unlocked house and leave notes on her kitchen table. Tr. IX-165. She has never told any constituent that she was unwilling to talk to them, Tr. IX-166, and, apparently, is available even at her son's soccer games. Tr. IX-167.

Legislators in Vermont will generally see anyone that wants to see them. Tr. VII-28. "Legislators [in Vermont] are accessible . . . even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81.

Of course, access may come in different levels. Access may depend on the size of the district, "the degree of influence of the constituent, whether the person is helpful or always comes with complaints, how often they attempt that access, how conscientious the legislator is, how proficient they are, maybe even the size of the last

election win. If you win in a squeaker, perhaps those legislators would be more responsive than the ones who win by a landslide." Tr. V-118 (Hooper). It is normal human nature for candidates to respond differently to constituents: there is nothing corrupt about this reality.

D. The public perceives Vermont as clean.

David Wilson, whose legislative committee testimony the State favorably cites, Sorrell Br. 2-3, expressed that "the link between a contribution and an outcome in Vermont . . . [has] not yet morally crossed the line where, again, we have the types of problems that I think we've all been reading in the newspapers that exist in other states and certainly in Washington." Ex. II, E-511-12.

Alice Bassett, cited for the allegation that the influence of money helped defeat a bottle bill, Sorrell Br. 2, said in that testimony that "My feeling is having been in the legislature for ten years, that Vermont's lawmakers are – it's a very clean state. I don't think much – many shenanigans go on. In fact, very, very few. I think my pitch for campaign finance reform is more an example to other states where there are many, many problems. I think a good, strong campaign finance reform bill would do a lot to set an example to other states." Ex. II, E-0425.

Neil Randall, another witness cited by the State, when asked if he thought the general public in Vermont has some concern over contributions, stated that he did not see "any case" of cynicism in Vermont, but that he would have a "personal concern" about a contribution from a single contributor that financed a high percentage of his campaign. Tr. IV-258-59. It is true that large contributions can pose the risk of real or apparent corruption, but far from true that meager $200-400 donations pose the same risk.

In fact, Vermonters do not seem to desire the extreme measures of Act 64. William Meub, gubernatorial candidate at the time of trial, testified regarding the people's

perception in Vermont that Act 64 "is clearly perceived as the kind of overregulation and dampening effect, and people have told me to do whatever I can to fight this legislation. So, when they know what it is, they're opposed to it. I haven't found anybody in any group when I have mentioned it, and I have asked for a show of hands, what do people think of it, I haven't found anybody who supports it." Tr. IV-72.

II. The Contribution Limits Are Too Low to Survive Constitutional Scrutiny.

The State claims that "it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded." Sorrell Br. 32. Petitioners wholeheartedly agree. It is *excessive* contributions that can pose the risk of corruption, but Vermont's original $1,000 per election contribution limits were not excessive. However, Vermont's new contribution limits are so "laughably low" that no risk of corruption could reasonably be perceived, as explained above. But they are also unconstitutional because they are too low to allow candidates to mount effective campaigns.

The State seeks to justify its contribution limits based on their effect on the "average" campaign. Sorrell Br. 40 ("Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates."). However, "[t]he average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." P.A. 236 (Winter, J., dissenting). Any meaningful assessment of the effect of these contribution limits are on those candidates who actually mounted some sort of campaign, particularly competitive ones.

Thus, Plaintiffs' expert Bensen specifically chose to analyze the races that were contested in any meaningful sense, using the $500 minimum required for reporting as

the basis. In the senate races he studied, those who were not required to report were uncontested or only lightly contested. Tr. III-37. There are races where campaigns do not make a difference to the outcome of a race. The State, however, misplaced its focus in analyzing the limits' effects on even uncontested races, which are irrelevant in determining whether contribution limits allow candidates to amass the resources necessary for effective advocacy, the test set out by this Court.

In addition, the State cites the percentage of contributions affected by the limits, rather than the amount of funds. Sorrell Br. 39 (10% of contributions received affected). Since the issue is whether the limits could have a "severe impact on political dialogue," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the focus must be the total amount of campaign *funds* that candidates would lose, not the percentage of contributions lost.

III. The State Has Failed to Prove That Its Purported Compelling Interests Justify Limiting Candidates From Spending Money on Their Own Campaigns.

A. The State has failed to prove that preventing real or apparent corruption justifies the expenditure limits here.

Respondents seek to transform the interest in preventing corruption posed by large contributions into an interest supporting expenditure limits. Sorrell Br. 22 ("spending limits directly counter political corruption and its appearance"); VPIRG Br. 6 ("*Buckley* embraced" the anti-corruption interest). However, this Court only "embraced" that interest as to contribution limits, and specifically rejected the interest for expenditure limits. Moreover, *Buckley* held that any "interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." 424 U.S. at 55. As a

result, "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

The State concedes as much, asserting that spending limits deter corruption by explaining that corruption includes the "use of *donations*," "the wishes of large *contributors*," and "favors that may be given in return for generous *support*," all references to alleged corruption stemming from *contributions*, *not* expenditures. Sorrell Br. 21 (citations omitted) (emphasis added). Thus, the real claim is the dreaded "arms race," where candidates and officials "fearing their opponents' war chests and concerned about being outspent . . . typically grant monied interests *excessive* portions of their limited time." Sorrell Br. 23-24 (emphasis added). The record, however, does not support this contention.

The record, when it does refer to any specific amounts of time fundraising, actually points to brief periods. For instance, Sen. Ready testified to spending an "afternoon" fundraising. Tr. IX-151 ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door."); *see also* Tr. IX-167 (Sen. Ready implying that she would "have lunch with or . . . meet with on a Saturday morning . . . [or] spend half of my son's soccer game talking to about their business" with some constituents).

Donald Hooper, cited at VPIRG Br. 17 n.16, indicated that under the prior contribution limits he would spend evenings "hustling campaign money." Tr. V-119. However, in his 1994 run for Vermont secretary of state, he had only 68 contributors who gave over $100. Ex. VI, E-1952-82. Even if he spent one hour per contributor, that would amount to less than 70 hours for his whole statewide campaign, certainly not an "inordinate" amount of time with these contributors.

Finally, the State claims that spending limits will

"relieve the pressure to afford special interest groups undue access and influence." Sorrell Br. 18. Respondents have failed to prove how spending limits will have any effect whatsoever on the giving of "special interest groups." Rather, it is likely that Vermont's spending limits, along with the draconian related expenditure provision, will cause candidates to rely *more* heavily on bundled contributions. Candidates will be reluctant to spend one dime of their meager allocated budget on fundraising costs and thus will be eager to accept the low-cost bundled contributions from "special interests."

Furthermore, *Buckley* specifically addressed "bundling" favorably. The Court, in upholding contribution limits, reasoned that the limits focus on the problem of large contributions while leaving persons free to continue to support candidates, albeit in a limited way. *Buckley*, 424 U.S. at 28. This preserved "the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 29 n.31. Thus, this Court viewed citizens' ability to band together to accentuate their contributions as a positive, not a negative.

B. The interest in incumbent time-protection is not proven.

Even if one sets aside the explicit incumbent-protection nature of this claimed interest, the demands of fundraising by incumbents have not been proven to be "inordinate." And, if it were true, as the State claims and the court below found, that "the demands of seeking campaign dollars *often* force officials and candidates to engage in fundraising rather than attending to their public duties," Sorrell Br. 12 (emphasis added), then there would be ample proof of such specific instances. However, there is not a single example of any incumbent having neglected one of their official duties as a result.

Furthermore, since this claimed interest is essentially

that challengers should be limited to the fundraising time that is convenient for incumbents to do, there needs to be evidence from incumbents on how much time they have available, aside from campaigning and performance of their official duties, for fundraising and how much could be raised during this time. There is no such evidence.

C. The interest in electoral competition has not been demonstrated to support mandatory expenditure limits.

Vermont's spending limits would not promote electoral competition as Respondents contend. Instead, the limits would devastate electoral competition by depriving challengers of funds they need to overcome the advantages of incumbency. As State expert Gross acknowledged, "most research which looks at the effect of spending on the outcome of elections indicate that on a dollar per dollar basis, challengers receive greater benefits from spending than incumbents do." Tr. X-81; *see also* Tr. III-163; Tr. IV-172.

Gross nonetheless thought this impact on challengers could be overcome under some circumstances because, "[i]n some ways, incumbents have a lot more to lose by spending limits simply because, particularly at the congressional level, they tend to have so much more money than challengers . . . if you have $800,000 and your opponent has $550,000, if you impose a $500,000 limit, you have more to lose." Tr. X-84.

However, in Vermont challengers often outspend incumbents so that challengers have more to lose in absolute dollars by spending limits than do incumbents. In Vermont house races, the average spent by house non-incumbents exceeded that spent by incumbents in each of the three election cycles before trial. Ex. III, E-991. Similarly, three incumbent statewide candidates were outspent by their challengers in 1998, Ex. III, E-987-88, and 5 of the 6 highest spenders in the last two campaigns

for senate from Chittenden County have been challengers. Ex. IV, E-1305-06.[2]

Thus, the record demonstrates that Vermont's expenditures limits will not only *not* promote electoral competition; they will devastate it.

IV. The Spending Limits Are Not Narrowly Tailored.

The State comments that "the district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont," calling those claims 'wholly unreasonable.'" Sorrell Br. 9. However, this Court reviews constitutional claims *de novo* and is not bound by the district court's findings.[3] Thus, this Court must independently examine the facts and the record demonstrates that the expenditure limits here are much too low.

The record clearly supports that these amounts are necessary for effective statewide campaigns. First, Kathy

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[2]Moreover, the small reduction in the expenditure limits for incumbent candidates does not alleviate this problem of incumbent advantage. "[T]here's no possible depreciation rate that I have found or anybody else has found that would be large enough to make that small 15 percent or ten percent reduction sufficient to offset this – this huge amount of reputation that the incumbent has already relative to the challenger." Tr. III-170 (Dr. Lott).

[3]This Court requires that "the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). Specifically, and as the Second Circuit's opinion below recognized, "the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review." P.A. 111a. This is especially true in the First Amendment context. *See Bose Corp. V. Consumers Union*, 466 U.S. 485, 501 (1984); *Sullivan*, 376 U.S. at 284-86.

Summers, campaign manager for gubernatorial candidate Ruth Dwyer, testified that Dwyer would need between $600,000 and $800,000 in her race. Tr. IV-81; VRSC Br. 19, 40, 42. Second, spending in the last three election cycles have proven that the district court's judgment was wrong. In the 2004 Vermont gubernatorial race, Jim Douglas spent $681,662 and Peter Clavelle spent $502,537. *See* Randall Br. Appendix. In 2002, Douglas spent $1.1 million and Doug Racine spent $723,907. *Id.* In 2000, Howard Dean spent $946,443 and Ruth Dwyer spent $899,581. *Id.* Third, even in 1998, two years before trial, Dean spent $657,065, more than twice the limits. *Id.* Clearly Vermont's statewide expenditure limits are woefully inadequate.

Further, the State claims that the expenditure limits for legislative candidates are adequate, since spending in House races were "less than the Act 64 spending limits *on average*," VPIRG Br. 27 (emphasis added), and since Senate "*average* spending" was less than the limits "in all types of districts save for single-member districts." *Id.* at 28. While *average* spending of *all* legislative candidates is an improper measure of the effect of these limits on candidate campaigns, spending since the district court's decision has proven it wrong. House *average* spending was $2,528 in 2000, $1,998 in 2002, and $2,883 in 2004 and Senate *average* spending in *all* races was $14,458 in 2000, $11,114 in 2002, and $12,463 in 2004. The Institute on Money in State Politics, *2000 State Election Overview* 5, *2002 State Elections Overview* 4, *2004 State Elections Overview* 4, available at http://followthemoney.org/Research.

V. There Is No Evidence That Parties in Vermont Are Corrupt by Acting as Conduits for Contributions from Donors to Candidates.

The only evidence offered by the State that parties "sell access to and influence over candidates and officials

in return for contributions" Sorrell Br. 44, is (1) that political parties in Vermont offer access to candidates at fundraisers, and that lobbyists are present at fundraisers, *id.*, (2) that industry donors give money to parties, *id.* at 44-45, and (3) that one of the Plaintiffs "shifted his donations to his party because of Act 64's limit on candidate contributions." *Id.* at 46. These examples prove nothing and fall far short of the evidence in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). That case found that the national Democratic Party used "tallying" to connect donors to candidates and also found that donors were informed that they could contribute to candidates via a contribution to the party. *Id.* at 459.

VI. Approval of These "Laughably" Low Contribution and Expenditure Limits Requires This Court to Accept a Radically Different View of Candidate Campaigns, the Compelling Governmental Interest in Preventing Corruption, and Ultimately the First Amendment Itself.

As the State's amici make clear, this case is not about the peculiarities of Vermont, but about a radical new vision of candidate campaigns, of the compelling governmental interest in preventing corruption, and of the First Amendment itself. This new vision is fundamentally at odds with the record, American experience and any reasonable interpretation of the First Amendment.[4]

A. Candidate Campaigns.

Respondents' favorite term for candidate campaigns is "arms race," Sorrell Br. 7, 17; VPIRG Br. 3, 10, 11, 15, 21, which is an analogy to military armament spending,

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[4]For a concise explanation of and justification for this new vision, *see* Ronald Dworkin, *The Curse of American Politics*, 43 The New York Review of Books (1996),available at http://www.lnybooks.com/articles/1388. For a similarly concise refutation, *see* Brubaker, *supra*.

primarily during the Reagan administration. VPIRG Br. 11 n.8 ("[C]andidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War."). While a nostalgic phrase for some, *see* Burt Neuborne, *Is Money Different?*, 77 Tex. L. Rev. 1609 (1999), most now recognize that the military buildup during the Reagan administration was not mindless, but a key factor in the collapse of the Soviet Union.

Similarly, candidate fundraising and spending is also not mindless. *See* VPIRG Br. 11 ("[W]hile it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more.") (emphasis in original). First, the State readily concedes that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country," Sorrell Br. 8 ("Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43."); VIPIRG Br. 30 (same); *id.* at 23 n.22 (describing House races as "very low-budget races"), because of "Vermont's small population and intimate campaigning style." *Id.* at 45. Nor do these low cost campaigns generate much fundraising pressure. VPIRG Br. 44 (Under the prior contribution limits, "a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign.").

Second, there are reasons for the rising costs of campaigns, including population growth, the expanding scope of government, the level of competition between the political parties, and the changing means and conditions of effective campaigning. Vermont has experienced this growth, as set forth above, particularly in competition between the political parties, with the Republicans

seizing control of the Vermont House in 2000 and the governorship in 2002 and 2004.

Third, campaign spending is necessary for voter education and has that effect. The American people's political knowledge base is abysmal. Only 33% of adults over 26 know which political party controls their state legislature. National Conference of State Legislatures, *Citizenship: A Challenge for All Generations* 7 (2003), available at http://www.ncsl.org/public/trust/citizenship.pdf. Increased campaign spending produces knowledge increases across the population spectrum. John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Politics 757 (2000); John J. Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Politics 916 (2001).

Fourth, challengers need financial resources to overcome the advantages of incumbency and they benefit more than incumbents by such spending. Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Science Rev. 469 (1978); Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 Pub. Choice 7 (1985); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 Am. J. Pol. Science 334 (1990).

So "arms race" is "a pejorative method of describing competition over voter persuasion, the very heart of the democratic process," P.A. 281a (Winter, J., dissenting), and "refers to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

B. The Compelling Governmental Interest in Preventing Corruption.

The compelling governmental interest in preventing corruption is based on this Court's finding that "sometimes *large* contributions will work actual corruption of

our political system," and that there is "a *corresponding* suspicion among voters." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000) (emphasis added). The State, however, would have this Court reject this formulation, in favor of a much broader one, in two ways: (1) by defining a "large" contribution to be a de minimis one, and (2) by separating perceived corruption from actual corruption.

First, the State claims that the contribution limits here "are directed at amounts considered 'suspiciously large.'" Sorrell Br. 14; *id.* at 9, 38 (same); VPIRG Br. 43 (same). It has already been demonstrated, by a review of the evidence, that there is no evidence that these contribution limits address amounts that are *suspiciously* large. VRSC Br. 8-9. But these contribution limits are not large by any measure. In 1974, Congress adopted the $1,000 per election contribution limits approved in *Buckley*. Adjusted for inflation, this limit would be $3,961.46 in today's dollars, Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov?cgi-bin/cpicalc.pl (last visited Feb. 20, 2006), or $7,962.92 for the election cycle. This is twenty times larger than Vermont's highest limit. In 1974 dollars, Vermont's highest contribution limit, adjusted to be per election, would be worth $50.48, *id.*, versus *Buckley's* approved limit of $1,000. $50.46 would have been considered small in 1974, not, by any measure, large.

Second, the State claims that its contribution limits may be justified by perceived corruption, absent actual corruption from contributions at these low limits. Sorrell Br. 33, VPIRG Br. 41. But it is well established that there is an underlying suspicion about politicians in America that precedes our founding and continues to today. The American National Election Studies, *Are Governmental Officials Crooked 1958-2004*, http://www.umich.edu/~nes/nesguide/toptable/tab5a_4.htm (last visited Feb. 20,

2006) (finding that from 1958-2004 24% to 35% of the American people believed that "quite a few" politicians were crooked, and only 26% to 10% thought that "hardly any" were). If perceived corruption were enough, government would have unbridled power to regulate campaigns.

C. The First Amendment.

Finally, Respondents ask this Court to reverse decades of its jurisprudence and find that the expenditure limits are not content-based regulations of speech, and are thus subject to lower scrutiny. VPIRG Br. 36-39. In *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), this Court found that li niting candidates' speech to certain pre-approved subjects is content-based. Since it is only expenditures "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates," 17 V.S.A. § 2801(3), that are subject to the expenditure limits, "by any commonsense understanding of the term," they are content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429(1993)."Indeed, were . . . expenditure limitation[s] unrelated to the content of expression, there would have been no perceived need for Congress [in enacting the expenditure limits struck in *Buckley*] to 'equalize the relative ability' of interested individuals to influence elections." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (quoting *Buckley*, 424 U.S. 1, 48 (1976)).

VII. The Presumption of Coordination Is Unconstitutional.

The State argues that Section 2809(d)'s mandatory rebuttable presumption of coordination is constitutional because, under Vermont law, the presumption merely shifts the burden of *production*, not the ultimate burden of *persuasion*. Sorrell Br. 48. Even if this is true, Section 2809(d) is still unconstitutional, because this Court's cases teach that mandatory rebuttable presumptions

violate due process even if the ultimate burden of persuasion remains with the State.

Vermont Evidence Rule 301(c)(1) provides that in cases of civil presumptions, the jury is required to find the existence of the presumed fact, "[i]f the evidence of the basic fact is such that no reasonable juror could find the nonexistence of that fact and if the party against whom the presumption operates has not met the production burden imposed on him" by the civil presumption. This Court's cases, however, hold that, in the criminal law context, shifting the burden of production through the use of a mandatory presumption violates Due Process. *See County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157-58 and n.16 (1979). Similarly, the First Amendment require that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (stating that civil presumptions affecting "important liberties cognizable under the Constitution" are accorded the same Due Process scrutiny as criminal law presumptions). The presumption here violates this requirement.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A Sections 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.[5]

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[5]The State is not entitled to a reversal of the decision below remanding the expenditure limits to the district court to determine if they are narrowly tailored, Sorrell Br. 50, because this was not raised in their Conditional Cross-Petition.

Respectfully submitted,

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NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

A. Buckley Properly Rejected Expenditure Limits As an Unconstitutional Restraint on Core Political Speech

Despite Respondents' best efforts to argue otherwise, Act 64's expenditure limits cannot be upheld without rejecting the core holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).[1] This Court should reject that invitation for three reasons. First, *Buckley's* recognition that expenditure limits directly restrict core political speech that lies at the heart of the First Amendment was correct. Second, Respondents' principal arguments largely mirror arguments that were considered and rejected in *Buckley*. Third, respondents' effort broadly to redefine the state's asserted interest in dictating the appropriate amount of political speech directly conflicts with core First Amendment values.

Throughout their briefs, Respondents describe Act 64 as if it were only about money and not about speech. Nothing could be further from the truth. Under Act 64's broad definitions, a candidate who has reached her expenditure limit is prohibited from any manner of campaigning. She cannot spend another dollar to carry her message forward or to respond to criticisms leveled by opponents, the opposing political party, advocacy groups or the media. The restriction applies to both cash and in-kind expenditures. Thus, for example, once a candidate has reached the statutory spending limit, Act 64

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[1] Unless otherwise indicated, the term "Respondents" refers to both the State Respondents and the Intervenor Respondents.

prohibits the candidate from even driving across town to a political rally.

This direct restraint on speech contravenes not only the holding, but the reasoning, of *Buckley*. It is not up to the government to decide how much speech is necessary for candidates and voters in a political campaign. That is a decision for the candidates and voters to make in our constitutional democracy. Indeed, the prohibition on election-day editorials invalidated in *Mills v. Alabama*, 384 U.S. 214 (1966), represents a "lesser intrusion on constitutional freedom" than a limitation on the amount a candidate can spend during an entire campaign. *Buckley*, 424 U.S. at 50.

Act 64 does something this Court has "never allowed": the Act "prohibit[s] candidates from communicating relevant information to voters during an election." *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002). By focusing on candidate speech, moreover, Act 64 has two perverse results. It deprives voters from hearing the most important voice in any political campaign — namely, the voice of the candidate. And, as a result, it magnifies the importance of so-called special interest spending, further undermining the state's asserted interest in limiting the influence of such groups on the electoral process. *Buckley*, 424 U.S. at 45.

In addition, expenditure limits inevitably blur the line between discussions of issues by candidates, particularly incumbents, and election speech. Candidates are intimately tied to public issues involving legislative proposals and government actions. *See, e.g. Buckley*, 424 U.S. at 42. Although candidates campaign on these issues, they are no less entitled to engage in the public discussion of those issues simply because they are also running for office. *Id.* at 52-53. "[T]he notion that the special context

of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Republican Party of Minn.*, 536 U.S. at 781. There are, as well, serious definitional issues in determining what speech by incumbents will count as an expense under Act 64. *See* P.A. 214a-218a.[2]

Respondents' failure fully to answer these fundamental criticisms of Act 64 is fatal under the exacting scrutiny required by *Buckley*, 424 U.S. at 44. The Court's cases involving speaker-based and content-based restrictions on candidate and electoral speech consistently apply the same exacting standard. *See, e.g.*, *Republican Party of Minn.*, 536 U.S. at 774-775; *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 785 (1978). Act 64 cannot meet this standard because it is not supported by a compelling state interest, and it is not narrowly tailored. For Act 64's spending limits to meet this exacting standard,

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[2] Respondents' argument that spending limits will not further entrench incumbents is simply not credible. Indeed, Vermont understood this would be the case, which is why slightly reduced limits for incumbents were adopted. The inadequacy of this fix is discussed in our opening brief at 16 n.11. More fundamentally, "everyone knows this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage." *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part); *see also Buckley*, 424 U.S. at 56-57 ("[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.").

Respondents "must demonstrate that it does not unnecessarily circumscribe protected expression." *Republican Party of Minn.*, 536 U.S. at 775 (citation, internal quotation marks, and alteration omitted). Act 64 fails this test because it unnecessarily restrains core political speech in a way that is barely tailored to serve the interests purportedly advanced by the Act.[3]

Buckley remains grounded in core First Amendment principles that this Court has never disavowed; indeed, they are the very principles that undergird our democracy. "[T]he concept that the Government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Thus, in discussing the limitation on independent expenditures, the *Buckley* Court rejected the argument that either the State's interest in preventing corruption, or the ancillary interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, could justify the burden on core First Amendment expression. Act 64 runs afoul of this principle by attempting to introduce financial parity into

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[3] The Intervenor Respondents urge the Court to abandon the exacting scrutiny required by *Buckley*, and to uphold the expenditure limits under the analysis applicable to content-neutral regulation of speech applied in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This argument underscores a fundamental misconception that the Court addressed directly in *Buckley*. Discussing its decision in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court explained that "[t]he decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use." *Buckley*, 424 U.S. at 18 n.17. By contrast, the Court explained, "[FECA's] dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information." *Id.* The same distinction applies to Act 64 because it operates as a direct restraint on speech.

the election process in a way that directly restrains speech. If Vermont wants to accomplish this goal, it can do so by providing a meaningful public funding alternative that does not suppress speech.

Turning next to the expenditure limits imposed on candidates from personal or family resources, the *Buckley* Court explained:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53.

As the Court stated in summarizing its position, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. That principle is not limited to self-funded candidates, and cannot be reconciled with the expenditure limits imposed by Act 64.

Finally, the *Buckley* Court noted that "[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions," not the aggregate financial resources available to the candidate's campaign. *Id.* at 55-57. The Court then concluded that the interest in alleviating the corrupting influence of candidate dependence on large

contributions is fully served by contribution limits and disclosure provisions. *Id.* at 56-57.

> Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.

424 U.S. at 56 (footnote omitted).

Despite this unambiguous holding, Respondents nonetheless argue that Act 64's spending limits can withstand the exacting scrutiny required by *Buckley*. To do this, Respondents grossly exaggerate the presence and appearance of corruption in Vermont and urge this Court to extend the definition of corruption in a way that moves beyond the rationale that is *Buckley*'s very foundation. That effort is both constitutionally and factually flawed.

B. Act 64's Expenditure Limits Are Not Supported by Any Compelling State Interest

1. *Expenditure Limits Are Neither a Necessary Nor Appropriate Response to Respondents' Overstated Claims of Political Corruption in Vermont*

Respondents grossly exaggerate the presence of "corruption" in Vermont. Respondent's grim view of the Vermont political scene would be unrecognizable to many Vermonters. It is not supported by the record, nor does it make intuitive common sense. Vermont is a small state with the second smallest legislative districts in the

country. House districts are often contiguous with the boundaries of a single small town, with a gross population of about 4000 and perhaps 2600 registered voters. Representatives serve in the legislature part-time; most have other jobs; you can speak with them over coffee in the local diner. Vermont's candidates and officials are not "locked away" in some office, as Respondents would have us believe; rather, both plaintiffs' and defendants' witnesses testified that door-to-door campaigning was the norm in legislative elections, and that Vermonters expected to meet candidates at "grass roots" events. Moreover, because of Vermont's small population, it has more "government per capita" than a large state and it is therefore relatively easy for "ordinary" individuals to have access to their elected officials. Vermont's Statehouse has no security check points and legislative hearings are posted on a user-friendly web site so interested citizens can attend. *See http://www.leg.state.vt.us/schedule/schedule2.cfm.*

Despite Respondent's shrewd emphasis on anecdotes suggesting that large contributors are disproportionately influential, elected officials who were witnesses for the State actually testified that they often returned constituents phone calls and readily provided access to "ordinary" voters. Elizabeth Ready, who was then a State Senator and has since served as Auditor of Accounts, testified that she provided access to any constituent. Voters in her district would leave notes on her kitchen table in her Lincoln home, which she leaves unlocked. Tr. IX – 165-66.[4] Similarly, Cheryl Rivers,

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[4] Despite her grass roots credentials, Ms. Ready vastly exceeded the Act 64 spending limit in the 2000 Auditor's race. *See http://vermont-elections.org/elections1/campaign_finance_history.html.* She served as State Auditor until 2004 when she was defeated

who was a State Senator at the time and has since run for Lieutenant Governor, testified that she would return the phone call of a homeless person before that of a large donor. Tr. VII – 106.[5]

Moreover, while Respondents use the terms "unlimited cash" and "unlimited campaign spending" over and over again in their briefs,[6] the record belies the rhetoric. Indeed, Respondents concede that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country." *Brief of Respondents Sorrell et al.* at 8. Vermont ranked 49th in spending in gubernatorial campaigns across the country. J.A. 49. If anything, the record shows that campaign spending in Vermont has been "restrained," not "unlimited." As such, the "arms race" posited by Respondents is a myth.

Similarly, Respondents have miscast or exaggerated the several claimed examples of improper influence set forth in their briefs. At the outset, it must be noted that if there were outright, egregious examples of corruption in Vermont it certainly would have been

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by political newcomer Randy Brock. Brock significantly outspent Ready in 2004, *see id.*, but despite the alleged "arms race mentality," Ms. Ready must not have believed it was necessary to spend as much as her challenger. *See Brock Wins Auditor*, The (Montpelier-Barre, VT) Times Argus (Nov. 2, 2004) (race was "shaped by questions about Ready's resume").

[5] Ms. Rivers similarly exceeded the Act 64 limits by more than double in her run for State Senate in 2000. *See http://vermont-elections.org/elections1/finance_search.html.*

[6] Respondents Vermont Public Interest Group et al., use the term "unlimited" as a modifier for "spending" or "fundraising" twenty-two times in their brief. The term appears in similar usage numerous times in the brief for Respondents Sorrell et al.

presented at trial. Instead, as examples, Respondents claim that the wine lobby and beverage companies succeeded in defeating an expanded bottle bill, in spite of public support for the bill. They assert similarly that the slate industry pushed through certain regulatory changes in the state's land use regulations after making contributions to committee members.[7] Finally, Respondents point to representatives of the tobacco industry who distributed checks at the Statehouse shortly after a vote on a bill affecting tobacco interests.[8]

In none of their examples have Respondents shown that the contributor's influence was in any way "improper." Rather, it is in the nature of politics that candidates will be influenced by their supporters and sometimes vote in a way that produces the political outcomes the supporter favors. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). In the absence of evidence that *large* contributions are being deployed to exert "undue" influence, there is nothing invidious about this type of responsiveness. "Democracy is premised on

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[7] The largest contribution cited by Respondents was a $500 contribution to members of a Senate committee considering legislation affecting that industry. Tr. II – 92. Such contributions were perfectly legal at the time, and are hardly egregious given that the new limits would permit industry groups to contribute $300 to each committee member.

[8] In fact, these contributions were all less than $100. Respondents also allege that then-Governor Dean met with representatives of the Monsanto Corporation while refusing to meet with members of a group of farm advocates on the same issue. Respondents mislead the Court by failing to set out the complexities surrounding the bovine growth hormone debate, which may well have influenced the Governor's decision on with whom he was willing to meet.

responsiveness." *Id.*; *see also Brown*, 456 U.S. at 56 ("We have never insisted that the franchise be exercised without taint of individual benefit...").[9]

Finally, much of Respondents' briefing is addressed to the public's distrust, apathy, and cynicism about the political process. The suggestion, however, that campaign spending is the cause of the public's malaise and that Act 64 will somehow cure it is surely short-sighted and lacks any understanding of history. Public cynicism and distrust of politicians is ancient. *See, e.g.*, Babylonian Talmud, Pirkei Avot 2:3. As such, the State has overplayed its hand; Respondents have greatly exaggerated the presence of "corruption" in Vermont while at the same time seriously understating the harm Act 64 will cause the political process as we know it. Rather than curing a "distorted political process," Act 64 will stifle core political speech and association.

2. *The State's Desire to Limit the Time Spent Fundraising Is Inadequate to Justify These Expenditure Limits*

Respondents and some *amici* note the increasing demands placed on fundraising in congressional elections.

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[9] "Access in itself...shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis in law or fact to say that favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also id.* at 259 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[Providing access to one's allies] is in the nature of politics — if not indeed human nature — and how this can properly be considered 'corruption' (or 'the appearance of corruption')...is beyond me.").

As we show in our opening brief at 16, 33-34, these concerns do not pertain in Vermont. Given the relatively modest sums spent on Vermont elections, especially in legislative elections, fundraising cannot be considered a significant concern. In any event, Act 64 actually makes fundraising more difficult because the expenditure limits were adopted in tandem with diminutive contribution limits. Limiting the size of individual contributions necessarily increases the amount of time that must be spent raising campaign funds. In addition, by applying the contribution limits equally to political parties and associations, the State has thwarted the ability of these organizations to consolidate the contributions of many individual supporters in a way that would lessen the time candidates spend fundraising. Of course, a generous and meaningful system of public finance would alleviate any remaining time-protection concerns.

C. Act 64's Expenditure Limits Are Not Narrowly Tailored

Quite apart from whether the spending limits further the interests they seek to advance, they are not narrowly tailored. No remand is necessary because *Buckley* has already established that contribution limitations and disclosure requirements are the "primary weapons" against the reality or the appearance of improper influence. *Id.* at 58. *Buckley* also established that public financing may be conditioned on the agreement to comply with specified spending limits. *Id.* at 57 n.65. Because Vermont has not tried any of these less speech-restrictive alternatives, Act 64 is not narrowly tailored.

There is no basis in the record to conclude that the State's interests in preventing corruption will not be

adequately served by reasonable contribution limits. Even if Act 64's contribution limits are set aside by this Court because they are unreasonably low, the record does not support the conclusion that the pre-existing limits, in combination with the State's disclosure provisions, are insufficient to address the danger of candidate dependence on large contributions. If the State believes these options are inadequate, despite the lack of record evidence, it remains free to adopt a meaningful public financing system. This option has the advantage of advancing the State's interests without suppressing core political speech. In their brief, the State Respondents refer to the failure of voluntary spending limits without mentioning that these limits were part of a pre-Act 64 system that did not provide the incentive of public financing.

Respondents claim that Act 64's spending limits are "precisely targeted" and will not harm candidates because they allow for "effective advocacy." But, as Respondents concede, Act 64's limits were set by looking toward "average" spending in previous elections, where reports were filed under the old law.[10] The problems inherent in relying on past averages are set out in our opening brief at 7-12, and 35-37. The amount of campaigning that gets done in any election — and hence the amount of spending — will vary by candidate, year,

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[10] Despite lengthy legislative hearings, Act 64's spending limits were not precisely tailored. The State did not employ a careful calculation or a proper statistical analysis that weeded out the highest and lowest spending races, or even make a reasoned judgment as to the amount thought proper for robust debate. Instead, the limits are merely set to approximate "average" (and here the term is not meant in its technical, mathematical sense) spending. This is not the narrow tailoring required by the First Amendment.

and district. In general, however, Act 64 will prevent candidates in state-wide contests[11] and in large multimember senate districts from communicating their message to voters. Candidates in elections that are hotly contested will be similarly stymied, as high spending races often involve important or controversial issues of public policy and intense public involvement.[12]

Removed from the statistics and abstractions, it is easy to see how these spending limits will harm many candidates, and a remand is not required to reach that conclusion. The $2000 limit will seriously impede many House candidates from running effective campaigns. As the record shows, most House candidates do engage in all manner of grass roots campaigning, including going door-to-door and attending community forums. *Brief of Respondents Sorrell et al.* at 8-9. Under Act 64's regulatory scheme, however, going door-to-door does cost money. The use of a car — necessary in Vermont's rural districts — must be accounted as an expense. Most candidates give out a brochure when they go door-to-

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[11] Spending in gubernatorial elections has vastly exceeded Act 64's limits, both before and after its passage. For example: 1986: Peter Smith $482,236, Madeline Kunin $478,294; 1988: Michael Berhardt $441,473, Madeline Kunin $639,863; 2000: Howard Dean $946,443, Ruth Dwyer $899,581, Anthony Polina $355,412; 2002: Jim Douglas $1,124,519, Doug Racine $723,907, Con Hogan $265,192. *See* Appendix at 1a (chart of spending in Vermont gubernatorial races from 1986 to 2004).

[12] The 2000 gubernatorial race was such an election. Governor Howard Dean had recently signed civil unions into law and his challenger, Ruth Dwyer, opposed the measure and urged her supporters to "Take Back Vermont." Road signs with the "Take Back Vermont" message sprung up throughout the State, and many still remain. Governor Dean and Ruth Dwyer each *tripled* the Act 64 spending limit in that race. *See supra* note 11.

door, particularly since many constituents may not be home. Tr. I – 103-104. Designing and printing a decent brochure for all the households in a district costs $350-650. Printing just 100 yard signs costs about $500. Postcard mailings may run between $600 and $900 per mailing, when the costs of design, printing and postage are factored in. Tr. IV – 150-176.

Accordingly, if a candidate buys yard signs and prints a brochure to distribute while going door-to-door, Act 64 limits him to sending out only one postcard. He cannot send two, and probably cannot afford much in the way of newspaper advertisements — even in inexpensive local papers.[13] This is why most of the witnesses testified that it cost more than $2,000 to run an *effective* House campaign, with estimates running from $3,700 to $4,000-$6,000. Tr. IV – 227-40; *Id.* at 156-171. In objective terms, this is not a lot of money. It simply allows a House candidate to buy yard signs, place a couple of ads in the local paper, print a brochure, and send out some mailings. Act 64's $2,000 limit prevents a House candidate from doing even this — and the problem is magnified if the candidate has a primary. Thus, Respondents are wrong to brush aside this evidence by claiming that these races represent the extremes and focus only on "targeted" races. This is simply what it costs to run an active, competitive, effective campaign.

II. VERMONT'S LIMITATIONS ON INDIVIDUAL AND PARTY CONTRIBUTIONS TO CANDIDATES ARE NOT CLOSELY DRAWN TO SERVE A SUFFICIENTLY IMPORTANT GOVERNMENTAL INTEREST

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[13] At the time of trial, a quarter page ad in *The Burlington Free Press* cost $1,448. Ex. V, E-1888-1897.

A. Even Allowing for Legislative Discretion, Act 64's Contribution Limits Are Unreasonable and Unjustified

Contribution limits must be "closely drawn" to serve a "sufficiently important interest." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-388 (2000) (citation and internal quotation marks omitted). Thus far, the only sufficiently important governmental interest identified by the Court is the avoidance of corruption or appearance of corruption that flows from *large* campaign contributions. *Id.* at 388. The evidence necessary to make this showing need not be as specific as that which would be required to sustain a direct limit on speech (such as expenditure restrictions), but where, as here, the record fails to disclose any evidence that large contributions are routinely made, the State's burden is not satisfied. This is because the justification for contribution limits stems not from campaign contributions *per se*, but from the potential for corruption attributed to *large* campaign contributions. The State's evidence on this threshold issue is extremely thin and largely misdirected.

Indeed, the record is barren of any evidence of objectively large contributions prior to Act 64. Spending was reasonably restrained in most races, and the press did a good job of exposing questionable practices. *See Brief of Respondents Sorrell et al.* at 35-39; Tr. IX – 95-96; Tr. VII – 112. Moreover, neither *Buckley* nor *Shrink* can be read to support the view that mere public cynicism of lobbyists and their activities can justify the type of stringent limits at issue here.

Lacking evidence of corruption under pre-existing limits or of a regime of large contributions, the State Respondents argue that they should not be required to

wait, in Vermont, until actual corruption occurs. Rather, Respondents urge, the legislature is justified in relying on evidence from other states or from the federal arena to justify draconian restrictions in Vermont. Citing *Shrink*, the Respondents essentially argue that the danger of real corruption is so inherent in the political system that they need not prove its actual existence. *Shrink* does not go so far. The fact that contribution limits are subject to diminished First Amendment scrutiny does not mean that they are subject to no scrutiny at all.

Moreover, even if only a scintilla of evidence is required to justify some level of contribution limits, the legislature still has an obligation, when it drastically reduces existing limits, to narrowly tailor the revised limits to fit the current circumstances. *Shrink* instructs that contribution limits be "closely drawn" to serve the interests they purportedly advance. 528 U.S. at 387-88. The idea that a candidate would be unduly influenced by a contribution from a single contributor of $200, $300 and $400 is counterintuitive and not supported by the record. Rather, the limits were set primarily to reduce overall spending, using averages that include even uncontested races, and incorporating irrational and unsupported features — including the per-cycle counting rule, and the wealthy family exception.[14] There is simply no excuse or corruption rationale for enforcing the limits on an election-cycle basis when the evidence shows that this practice will plainly disadvantage candidates who have exhausted their base of contributors to win the party

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[14] Under the Act, campaign contributions from "immediate family" members are not subject to any limitation. The Act strangely defines "immediate family" members as persons related within the "third degree of consanguinity." At trial, even Defendants' attorneys did not know the definition of "third degree of consanguinity."

nomination and must identify new contributors to finance the general election. Whenever a candidate must face an opponent in the general election who did not have a primary opponent, the disadvantage cannot realistically be overcome. Tr. II – 185-89; Tr. IV – 177-78; Tr. IV – 27-34. Respondents fail to respond to these objections, except to press the State's bottom-line argument that it has virtually plenary power to regulate campaign contributions.

B. Political Parties Should Not Be Treated As If They Were Single Individual Contributors

In treating political parties and political committees as if they were individual contributors, moreover, the limits trample the weighty associational interests at stake by restricting the rights of individuals who come together for a common purpose. Instead of reining in the "special interests" and industry groups that concern the Respondents, Vermont's new limits will choke-off "clean" money from the very sources that clearly pose a lesser risk of corruption. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour boost of resources in a close election. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

Moreover, Respondents' reliance on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), is misplaced. In that case, this Court sustained regulation of party-coordinated expenditures against an argument that all party limits were unconstitutional. *Colorado II* does not stand for the

broader proposition that political parties can be regulated as if they were single individual contributors. As the district court recognized, "Political parties speak with a different voice than individuals." P.A. 76a. With Vermont's $200-$400 election cycle limits and the related expenditure rule, parties will be unable to run coordinated "get out the vote" campaigns with candidates, share mailing lists, allow paid staff to assist candidates, or, in short, to engage in any of the typical (and decidedly non-corrupt) activities they have previously done. The district court struck down these low party contribution limits, finding that "[f]or the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past." P.A. 76a.

III. THE FIRST AMENDMENT DOES NOT PERMIT VERMONT TO TREAT INDEPENDENT EXPENDITURES AS CONTRIBUTIONS

Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. Under this "Related Expenditure" provision, these independent expenditures are regarded as the candidate's own speech and counted as both contributions to the candidate and expenditures by the candidate — subject to the relevant limitations. It is axiomatic that Supreme Court precedents prohibit limitation of independent expenditures. *See Buckley*, 424 U.S. at 45-47; *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*") (plurality opinion); *id.* at 627 (Kennedy, J., concurring in the judgment and dissenting in part). Because of the constitutional difference between independent expenditures and "contributions," it is not constitutionally

permissible for the Vermont to presume that the former is the latter. Moreover, treating "related expenditures" as contributions to the candidate is quite restrictive, as a political party will use up its allotted $200-$400 contribution limit quickly and then be prohibited from making any other direct, in-kind, or "related" contributions to the candidate.

For the first time in this litigation, the State Respondents now claim in their brief that the presumption "comes into play only if the matter is brought to court" and is "merely an evidentiary presumption." *Brief of Respondents Sorrell et al.* at 48. Such assertions fly in the face of the statute, the Vermont Secretary of State's official guidance,[15] and the position Respondents have taken throughout this litigation. Political parties, committees, PACs and candidates are all required to report spending and contributions at specified times and on forms promulgated by the State. 17 V.S.A. §§ 2803, 2811, 2821-23, 2831. If a political party makes an expenditure that benefits six or fewer candidates, it is "presumed" to be a "related" expenditure. 17 V.S.A. § 2809(d). This is part of the *definition* of a "related" expense, not, as the State now asserts, merely part of a procedural rule for litigation. As such, the plain language of the statute would require the party to report the contribution to the candidate, and for the candidate to report the same as a contribution and expense.

The state thus grossly underestimates the chilling effect of the "related" expenditure provision. While the presumption can be rebutted, both the candidate and party are presumed to have violated the law whenever a party

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[15] *See http://vermont-elections.org/elections1/2005CFGuide1129rev.pdf* at 13-15.

makes an expenditure over the $200-$400 contribution limits to benefit six or fewer candidates. Recent statutory amendments give the Attorney General additional investigative powers to enforce these provisions. 17 V.S.A. § 2806a. The candidate will be forced to expend her limited resources to disassociate from independent spending over which she has no control.[16] Those unwilling to risk prosecution by the State — or suits by their opponents — will be effectively silenced.

CONCLUSION

For the reasons stated herein, in our opening brief and in the briefs of the consolidated Plaintiffs, the judgment below should be reversed.

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[16] The State Respondents now suggest for the first time that the costs of defending against such prosecution or investigation may not count as an "expenditure." *See Brief of Respondents Sorrell et al.* at 26 n.15. This flatly contradicts the plain language of the statute and the Vermont Secretary of State's "authoritative construction." *See http://vermont- elections.org/elections1/2005CFGuide1129rev.pdf* at 11 (no difference between a political party's administrative expenses and any other expenses).

APPENDIX

Chart Showing Spending in Vermont Gubernatorial Elections from 1986-2004

Available at http://vermont-elections.org/elections1/campaign_finance_history.html

SPENDING IN VERMONT GUBERNATORIAL ELECTIONS 1986-2004

1986	Peter Smith	$482,236
	Madeline Kunin	478,294
1988	Madeline Kunin	639,863
	Michael Bernhardt	441,473
1990	Richard Snelling	447,479
	Peter Welch	281,541
1992	Howard Dean	253,528
	John McClaughry	131,407
1994	Howard Dean	180,145
	Thomas Morse	113,426
1996	Howard Dean	$124,975
	John Gropper	46,241
1998	Howard Dean	657,065
	Ruth Dwyer	249,188
2000	Howard Dean	946,443
	Ruth Dwyer	899,581
	Anthony Polina	335,412
2002	Jim Douglas	1,124,519
	Doug Racine	723,907
	Con Hogan	265,192
2004	Jim Douglas	681,662
	Peter Clavelle	502,537

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Nos. 04-1528, -1530 & -1697

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,

v.

NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CATO INSTITUTE, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE REASON FOUNDATION IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional pro-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

tections for political speech and association relating to elections, which lies at the very heart of the First Amendment.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies. Central to the mission of the Goldwater Institute's Center for Constitutional Government is studying the constitutional implications of campaign finance reform. The issues presented in this case are of interest to the Goldwater Institute because they involve the fundamental right of all citizens to freely participate and share their point of view in the electoral process. Proponents of increased campaign finance regulations consistently expand the class of justifications supporting limitations on core political speech. Crucial to the preservation of political speech is the renewal of a classical understanding of the robust strength afforded by the First Amendment and its narrow class of exceptions.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

STATEMENT

The Second Circuit in this case has sanctioned an unprecedented and radical restriction on the amounts candidates may *expend* on speech, thus cabining the actual *amounts* of speech they may generate and the *reach* of that speech. It did so on the basis of two supposedly compelling interests that are a far stretch from the interests recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and a considerable stretch even from the somewhat expanded interests applied by this Court in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

The two allegedly compelling interests identified by the Second Circuit are the "interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising[] and (2) the effect that perpetual fundraising has on the time of candidates and elected officials." 382 F.3d 97 (footnote omitted).

The court below also found such interests to be supported by the record before it, a conclusion that mistook the volume of "evidence" for its quality and relevance. The court sub-

stantially deferred to the conclusions of the Vermont legislature, rather than scrutinizing those conclusions to see whether the evidence in fact supported them. *See id.* at 97 n. 1.

While there are many things wrong with the Second Circuit's reasoning and result, this brief will focus primarily on the two interests relied upon by the court to uphold the candidate expenditure limits.

SUMMARY OF ARGUMENT

1. Under strict scrutiny, not every legitimate interest rises to the level of a "compelling" interest. Rather, compelling interests must be different in kind and magnitude from otherwise ordinary, or even important, desires to fix perceived flaws in the political system. Compelling interests likewise must be reasonably definite and have some manageable stopping point, otherwise the limits imposed by strict scrutiny will be diluted to the point of being meaningless. Strict scrutiny likewise requires an independent and meaningful review of the facts alleged to support any claimed compelling interest. Even in the less-scrutinized area of commercial speech, this Court analyzes the facts to ensure that the claimed interest is real and not conjectural. It should be even more diligent under strict scrutiny of direct limits on candidate speech.

2. Vermont's alleged interest in combating the supposed influence and access derived from modest and limited contributions does not involve corruption and is neither compelling nor supported by the evidence. Our representative democracy necessarily involves the exchange of political support for official action. Such support comes in many forms, and legitimately includes at least limited campaign contributions that can only be used for speech. While extreme or coercive influence from large contributions may exert "undue" influence over an office holder, the influence that comes from more limited political contributions *per se* is not illegitimate. While equality in voting is protected at the ballot box, perfect equality of influence in the legislature is not the measure of

whether the system is corrupt. The absence of such egalitarianism is not a threat to legislative processes, which are already protected by numerous checks against undue influence, and is not compelling either in kind or in magnitude in this case. Furthermore, Vermont's egalitarian interest is neither supported by the evidence, nor is its solution narrowly tailored.

3. Vermont's alleged interest in "protecting" candidate time so that it may be reallocated to official duties or to speech activities that Vermont prefers over campaign solicitation and spending is neither compelling nor supported by the record. Saving time for official duties as an interest both proves too much and too little. It would justify a host of other restrictions on office holders, yet it offers no justification for restricting challengers whatsoever. Vermont's lack of direct efforts to require office holders to perform their jobs also undermines the genuineness of the interest and Act 64's failure to require that freed time be reallocated to official duties suggests that it will not in fact serve the claimed interest. As for reallocating time between different forms of campaign speech – solicitation and media buys versus personal voter interaction – that interest is simply invalid, as it is up to speakers and listeners to decide how best to speak, not up to the State. And as for the evidence relied upon by Vermont and the Court below, none of it shows that fundraising actually diverts time from the activities Vermont prefers, as opposed to other activities, or that lower spending would reallocate candidate time as Vermont imagines.

ARGUMENT

I. Strict Scrutiny Requires a Narrow View of Compelling Interests and a Critical Review of the Facts Claimed To Support Such Interests.

A. There Are Few Genuinely "Compelling" Interests.

If the current strict scrutiny paradigm has any meaning at all, then presumably the demand that the government establish a "compelling" interest, as opposed to merely "valid" or "important" interests, creates some *meaningful* hurdle that an asserted interest must overcome. That is simply a necessary corollary to the existence of strict scrutiny in the first place. A compelling interest thus should be different in both kind and magnitude from the otherwise broad range of interests that might support government action under lesser scrutiny. Interests that are "too amorphous" or "indefinite[]" or that have "no logical stopping point" are not compelling and would provide far too much leeway for regulation in areas most strongly protected by the Constitution. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality) (lack of compelling interest for racial classifications).

B. The Facts Establishing Any Compelling Interest Must Be Critically and Skeptically Reviewed.

As this Court has held, appellate review of facts in a First Amendment case must be independent and must guard against the manipulation of the facts to circumvent the protections afforded to speech. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Indeed, this Court has consistently turned a skeptical eye to legislative findings in support of speech restrictions, even in the less-scrutinized context of commercial speech. *See, e.g., Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 188, 192 (1999) (government must demonstrate the "'harms it recites are real,'" not "'mere speculation or conjecture'"; failure to take non-speech regulatory action to address alleged inter-

est undermines asserted interest) (citation omitted); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regulatory scheme undermined asserted government interest).

While this Court occasionally has given greater leeway to legislative findings in the context of *contribution* restrictions – seemingly because the speech-value of contributions have been considered slight and the level of scrutiny is accordingly relaxed – there is no justification for importing such leeway into genuine strict scrutiny of candidate expenditure limits, which directly cap the amount and scope of candidate political speech. Instead, this Court should insist, as in the commercial-speech context but with greater vigor, that the harms asserted by the State are "real," not "conjecture," and that they in fact flow from the activity being restricted.

While the court of appeals purported to review the facts independently and meaningfully, it significantly diluted its factual scrutiny in this case and often expressed inappropriate deference. For example, it endorsed the district court's "'considerable deference' to the legislative findings on the need for the law," and cited favorably to Justice Breyer's concurrence in *Shrink*, which suggested deference to the legislature's "'political judgment.'" 382 F.3d at 113 (citations omitted). The court of appeals likewise did "not question the validity of the factual findings developed by the legislature in support of Act 64,[]" and erroneously placed upon the plaintiffs the burden of producing "competing evidence" rather than accepting for itself the duty to skeptically review the legislature's "findings" from the outset. *Id.* at 114 (footnote omitted). But it is the State's burden to establish its interest, and where a critical review of the State's evidence is sufficient to undermine the State's conclusions, a compelling interest has not been established, notwithstanding whether plaintiffs proffered *evidence* rebutting the State's speculative or incomplete findings. *Cf. Celotex Corp.* v. *Catrett*, 477

U.S. 317, 323 (1986) (no need to proffer evidence to overcome a party having, yet failing, the burden of proof).

II. The Claimed Corruption Interest Used To Support Expenditure Restrictions Is Neither Compelling Nor Supported by a Proper Review of the Record.

Corruption, like "torture," is a particularly loaded term that suggests a severe breach of duty incompatible with our political system. For the concept of corruption to carry the moral and legal weight it has acquired and to constitute a "compelling" interest, it cannot possibly encompass practices that are merely unfair or inequitable, but must be limited to a narrow class of extreme deviations from acceptable political practices. To expand the notion "corruption" to include every perceived unfairness is to empty the concept of meaning.

In this case, Vermont's interest amounts to little more than promoting an unreachable egalitarian ideal of *equal* political influence, not combating corruption properly defined. While such a quixotic goal may be permissible, and may even be laudable in a naïve sort of way, it is not compelling.

Disparities in influence are an inherent result of freedom in both politics and the economy and cannot be eliminated without also eliminating the very freedom that makes them possible. Attempting to eliminate all such disparities – rather than simply the most severe and extreme ones – is an endless task at odds with our constitutional system. While eliminating the effects of "large" contributions resulting in grossly "undue" influence may relate to a plausibly limited notion of corruption, eliminating every minor disparity among political actors of different strength, wealth, and motivation is nothing short of a radical repudiation of the very freedoms that allow such disparities to exist. Such a goal is not related to corruption and is not a compelling interest.

A. The Proper Role and Means of "Influence" in Our Constitutional Democracy.

To understand and cabin the notion of corruption, it is essential to reflect on what this Court has already considered corrupt and what sorts of influence are necessarily proper or "due" given the essential predicates of our democracy.

Since *Buckley*, *quid pro quo* arrangements of campaign cash for legislative action have been considered corrupt. The corruption rationale, however, has also been expanded to include the "'undue influence on an officeholder's judgment, and the appearance of such influence'" stemming from large campaign contributions. *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). The rationale has also encompassed the influence exerted by supposedly illegitimate political actors, such as corporations and labor unions, who may parlay government-conferred "special advantages" for acquiring wealth into "an unfair advantage in the political marketplace" and who may act "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Id.* at 155-56 (citations and quotation marks omitted).[2]

But even accepting such a view of corruption as a given in this case, this Court still must find some limit on the more nebulous aspects of corruption if the core of the First Amendment is to retain any significance. In particular, the notion of "undue influence" is a bottomless pit absent some coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See* Jaffe, McConnell *v.* FEC: *Rationing Speech*

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[2] The problems with such an expanded notion of corruption have been catalogued by these *Amici* in prior submissions to this Court. *See* Brief of *Amici Curiae* Center for Competitive Politics, *et al.*, *Wisconsin Right to Life* v. *FEC*, No. 04-1581 (Nov. 14, 2005); Brief of *Amici Curiae* Cato Institute and Institute for Justice, *McConnell* v. *FEC*, Nos. 03-1674 & consolidated cases (July 8, 2003).

to Prevent "Undue" Influence, 2003-2004 CATO SUPREME COURT REVIEW 245, 295-96 (2004).

The first question for this Court, therefore, is what types and degrees of influence are proper or at least acceptable in our constitutional system and what types deviate so far from such a baseline as to be deemed "corrupt."

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. The exchange of *elective office* for desired *official conduct*, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper.

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by periodic voting alone, but also by the political speech of competing interest groups and individuals. What Vermont disparagingly refers to as an "arms race" is in fact a *speech* race, with the goal of persuading voters of competing positions. That such speech is more efficiently and effectively conducted through means that cost candidates money, rather than simply their own or their supporters' time, does not change the fact that the sole use of such money is on speech. Providing financial resources for candidate speech is thus no different, or less valid, than providing personal support for such speech, other than that it is more efficient and effective at helping candidate speech reach the public. Contributions thus are not "arms," they are merely vehicles for speech. And insofar as facilitating such speech, like every other form of political support, may provide some influence to the facilitator, it is simply part of the inherent and proper democratic political exchange.

This Court, however, has deemed the existence of certain types of "undue" influence to be corrupt, which seems to suggest influence out of proportion to the person or group wielding it. The notion of "disproportional" influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary. But the falsely egalitarian notion that the speech of persons and groups *ought* to have influence in strict proportion to the voting strength of the speakers fundamentally misunderstands the principles and predicates of the First Amendment.

In light of such protected means of influence, the disparagement of "special interests" by Vermont and others makes no sense. While such groups may focus their resources on narrow issues, and gain influence from such concentrated attention, such influence is hardly "undue." People routinely focus their energies on what matters most to them, and tend to have influence correlated to the energy invested. That is the nature of *all* interests in a democracy, "special" or otherwise.

Indeed, if anything, a proliferation of relatively narrow and competing interests was a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45

(Rossiter & Kesler eds., 1999). He also recognized that faction was the inevitable result of freedom and could only be eliminated "by destroying the liberty which is essential to its existence," which would be a remedy "worse than the disease." *Id.* at 45-46 Madison's solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Just as the influence exerted by special interests is a natural and acceptable aspect of democracy, campaign contributions are likewise entirely valid means of providing political support, even if such support results in some degree of access or influence. Indeed, this Court has never said that *any* value placed by a candidate on *any* level of contribution is "undue" or "corrupt." Rather, this Court has limited "corruption" to the influence exerted by *large* contributions. *See McConnell*, 540 U.S. at 95 (idea that "large contributions" can corrupt not novel); *Buckley*, 424 U.S. at 26 (danger from "large contributions"). To suggest that all money in politics – even limited contributions used only for speech – is corrupting is to radically depart from the notion of policing "large" contributions, and would eliminate virtually any possibility of "freedom" of speech in a world where "effective political speech" necessarily costs money. *See Buckley*, 424 U.S. at 19.

Finally, to the extent the provision of political support – whether through contributions, direct political speech, or the donation of time to a campaign – is partly a function of wealth, such differential capacity for support does not render any influence deriving therefrom "undue" or illegitimate. Indeed, *Buckley* correctly recognized that government may not "restrict the speech of some elements of our society in order

to enhance the relative voice of others." *Id.* at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

B. Equalizing Personal "Access" to Candidates and Office Holders Is Not a Compelling Interest.

The supposed corruption interest relied upon by the Second Circuit in this case is a far cry from the corruption interest recognized by this Court. There is no *quid pro quo* interest asserted here, and there are no "large" contributions involved given the contribution limits imposed by Vermont. Such limits are precisely the solution to "undue" influence sanctioned by this Court, and appropriately low limits (coupled with means to prevent their circumvention) serve to eliminate – or at least reduce to a non-compelling level – the risk of corruption. And there is no threat from illegitimate political actors in that it is the candidate's expenditures being limited and all contributions are from individuals or PACs.

Instead, Vermont is claiming the novel interest in avoiding reliance on contributions of *any* amount because it deems any marginal influence or access from even modest contributions to be "undue." The problem, supposedly, is that uncapped spending makes contributions desirable to candidates, that candidates thus will "sell" access to contributors, and that those who contribute, or at least contribute at the top of the limits, will receive preferential access relative to those who contribute less or not at all.

Vermont's interest thus boils down to a desire to mitigate relatively minor disparities in access thought to be a result of differential contributions within a system that already limits contributions to modest non-corrupting amounts by Ver-

mont's own reckoning. Such relatively minor disparities in access may be considered unfair, and may be alleged to create some un-measurable degree of distortion in the system, but they hardly constitute "corruption." The desire for more egalitarianism in political *influence*, beyond the existing egalitarianism in actual voting, may be permissible and may or may not be laudable, but it does not entitle Vermont to equate any deviation from some egalitarian ideal with "corruption." Indeed, the problems with such an expansive notion of corruption are myriad.

First, this Court has refused to adopt such a wholesale indictment of contributions *per se*, and has repeatedly recognized that contributions to candidates are valid – and protected – means of expressing political support and engaging in political association. *See Buckley*, 424 U.S. at 23, 24-25. Insofar as such valid support and association translates to some added influence on a candidate, such influence is likewise valid and cannot, *ipse dixit*, be deemed "undue." Any disparities in the ability or willingness of people to give contributions is not at all incompatible with our constitutional system. "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("*MCFL*").[3]

Second, Vermont focuses solely on minor economic aspects of disparate influence, as reflected in differential contributions, while ignoring the far more substantial disparities in political influence generated by wealth, celebrity, occupation, ability and willingness to donate time, and a host of other fac-

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[3] That this Court does not view mere disparities in influence based on financial means to be corrupt can be seen in its refusal to consider the poor a "suspect" class. If the corruption of the legislative process were as bad as Vermont says, one would think the products of that corrupt process would receive heightened scrutiny. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). That they do not suggests the absence of meaningful "corruption" and the lack of a compelling interest.

tors unrelated to the voting strength of individuals. But such disparities in wealth and other resources that can enhance political influence are the inevitable consequence of a free society and a relatively free economy, and there are good practical and policy reasons for accepting such disparities. To the extent such other more significant causes of disparities in access and influence remain, one must question the genuineness of Vermont's interest and ask why contributions are a uniquely illegitimate means of competing for such influence.

Is it more equal to give access to a celebrity or an interest group whose members devote their time, rather than money, to a candidate's campaign? Insofar as the ability to make a contribution gains access for persons lacking in time or ability to engage in such other means of political support, money becomes an equalizer, not a source of undue preference.[4]

Third, to the extent that Vermont is arguing that contributors gain access over non-contributors, the question is why it matters from a systemic perspective. It would seem to matter only if the opinions of non-contributors are not heard. Given that legislators will never have the ability to hear from *every* constituent on *every* issue, they necessarily depend on proxies who collectively can express the views of larger groups of constituents. Vermont's alleged interest seems to suggest that those who cannot give lack proxies and will not have their views expressed by those who can and do give. That assumes

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[4] There is no meaningful difference between a supporter contributing $400 which is then used to hire a canvasser and that same supporter volunteering as a canvasser himself. While a cash contribution may be a more *efficient* means of adding value for a supporter with little spare time but highly marketable skills, the value to the candidate is the same. To indict the use of cash but not time as a means of supporting a candidate is to indict the free-market notions of specialization and efficiency without explaining why influence derived from *either* form of support is "due" or "undue." Any inevitable differences between the degrees of support different persons are willing or able to give – either in cash or in kind – are at least severely limited in the context of cash contributions.

that contributors, as a group, hold different views than non-contributors. While that assumption is questionable, the fact that it underlies, in part, Vermont's interest demonstrates such interest is based on content and viewpoint, and that Vermont seeks to limit the influence of disfavored viewpoints.

Finally, the means by which Vermont has chosen to address the supposed problem cast serious doubt on its existence. While the alleged problem turns on the influence gained through contributions, Vermont has not chosen to ban such contributions, or further lower them to the point where they are not a threat at all, but rather has chosen to limit the *expenditures* – and hence the amount and scope of speech – of candidates as a means of supposedly reducing the *value* of contributions. But any such reduction in contribution value is at the margins at best, and so long as money is required for speech, contributions will be valued by candidates. That Vermont is thus willing to tolerate the continued supposed inequities among contributors and non-contributors, at largely the same levels as existed prior to Act 64, suggests that the interest it alleges is not particularly strong or pressing.

C. The Record Does Not Support a Significant Danger of Undue Access.

Notwithstanding whether Vermont's interest involves "corruption" or is theoretically compelling, the evidence relied upon by the Second Circuit simply does not support the notion that uncapped candidate *expenditures* in the context of already limited *contributions* even implicates that interest. Whatever interest exists in limiting improper preferential access is largely cured by contribution limits and whatever risk remains, if any, is so attenuated and minor as to constitute no genuine danger whatsoever.

The evidence recited by the court of appeals overwhelmingly relates to the dangers posed by *large* contributions, not by expenditures of the candidates themselves. For example, the court of appeals endorsed the district court's finding "'that

large contributors often have an undue influence over the legislative agenda.'" 382 F.3d at 116 (citation omitted) (emphasis added); *see also id.* at 117 (reliance on fewer "larger contributors"); *id.* at 118 n.12 ("large sums"); *id.* at 104 (discussing the supposedly "widely-held public view that donations *in excess* of the Act's limitations were suspicious") (emphasis added). Missing is any evidence of a relationship between uncapped expenditures and any increase in corrupting influence of already limited contributions.

While the court of appeals recognized the obvious disconnect between evidence relating to large contributions and the restrictions imposed on out-of-state contributions, *id.* at 105 (record only supports inference that out-of-state "contributions raise the risk of corruption when they are large – a problem solved by the contribution limits"), it failed to recognize the same disconnect as to candidate expenditures derived solely from limited contributions.

Alleged "Undue" Influence of Special Interests. Generic suggestions that the need to raise money gives influence to interest groups likewise fail to show corruption at all, much less tie it to candidate expenditures above the expenditure ceilings imposed by Vermont. The Second Circuit's reference to "studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates," *id.* at 103, falls far short of establishing that such pressure, if even a function of contributions at all, are caused by candidate spending *above* Vermont's spending cap, as opposed to the need to compete for political and financial support even below the cap. And the evidence certainly does not distinguish between the influence such groups have as a function of numerous supporters, more strongly motivated members, and superior political organization from influence obtained through meager contributions.

Even where interest groups elect to "bundle" the limited individual contributions of their members or supporters, such

bundling is no more than ordinary free association, produces a net contribution tied precisely to the degree of individual support behind the "interest" represented by the bundler, and hence can hardly be deemed any more "undue" than a single contribution within Vermont's limits. *Cf. MCFL*, 479 U.S. at 258 (resources aggregated by a corporate PAC "in fact reflect popular support for the political positions" of the PAC). That individuals choose to act together to demonstrate the depth and breadth of support for an interest is the very point of the freedom of association in the first place, and is not corrupt.

Alleged "Undue" Influence of Contributors Generally. Once contributions are limited to the low per-person levels set by Vermont, there is absolutely no evidence that the *marginal* differences in amounts between contributors, or between contributors and non-contributors, results in any *undue* access or influence. Certainly there is no evidence that access to candidates is exclusively, or even significantly, a function of cash contributions. And basic common sense suggests otherwise. For example, if the non-contributing citizen was a major employer, that person would have a greater prospect of access than the lone citizen contributing a measly few hundred dollars. Likewise with newspaper reporters or editors, community leaders, campaign workers, or even family friends. It is quite novel, to say the least, for Vermont to suggest that whatever access comes from a relatively meager contribution once every two years is "undue" relative to the access that flows from myriad other considerations.[5] And even as between otherwise similarly situated citizens, there is no evidence that the larger contributor has significantly different

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[5] *See* Stephen Ansolabehere and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding that "the evidence that campaign contributions lead to substantial influence on votes is rather thin • • •. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes.").

access to candidates (or even much access at all) or that such marginal comparisons are a significant phenomenon at all.[6]

The utterly marginal comparisons offered by Vermont involve trivial differences in influence in the context of the full range of influences that exist on a candidate, and minor disparities in contributions have not been shown to be a significant factor in overall access to candidates. Having eliminated any coercive influence of large contributions, any remaining influence of small contributions does not establish a compellingly harmful kind or degree of influence.

Alleged Harms from Uncapped Expenditures. The evidence in this case likewise does not support the notion that total candidate spending, and particularly spending *above* the expenditure limits set by Vermont, has any effect whatsoever on the supposedly corrupting potential of limited contributions. At a minimum, it seems self-evident that, absent spending caps well *below* the amounts spent on recent Vermont campaigns, expenditure limits will have no conceivable connection to the *existing* and supposedly "undue" influence of contributions. Because Vermont selected spending limits designed to match past spending, 382 F.3d at 129-30, it seemingly has no interest in eliminating existing undue influence.

And even if Vermont's expenditure caps are below the hypothetically larger amounts to be spent on future campaigns, neither evidence nor logic suggests that increased campaign spending increases the influence of larger contributors over smaller ones. Rather, increased spending would force candidates to broaden their appeal beyond the limited number of maximum donors, whereas spending caps would

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[6] Even the very notion of preferential access seems absurd in most situations in Vermont. Assuming that a House member in a race already costing less than $2000 would indeed give any meaningful preference to a $200 donor as opposed to any of the merely 1000 voters needed to win election, 382 F.3d at 130-31; 118 F. Supp.2d at 471, such a donor – or ten of them – would hardly monopolize two years of the official's time.

accordingly *reduce* the necessity for smaller donors and have *no impact* on the level of influence of non-contributors. Future increases in total spending would seem to progressively decrease the value of even maximum contributions as they became smaller and smaller percentages of the total funds needed. Any individual or group, therefore, would have progressively less importance as a donor, and what would begin to matter more would be significantly expanding the *pool* of donors, not merely appealing to a select few.

Whatever marginal differences in access might be thought to come from differential contributions thus has nothing to do with the *size* of campaign expenditures, but rather with the fact that candidates can spend *any* money from contributions, thus giving those contributions value. That Vermont continues to allow spending at past levels is powerful evidence that Vermont does not actually believe that contributions below the amounts set in Act 64 are corrupting and that the Act's real interest is to limit the *amount* of speech by candidates.[7]

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[7] There is ample reason to be suspicious of the motives of Vermont's incumbent legislators in limiting the amount of candidate speech. One generally accepted lesson that has emerged from academic research on campaign finance is the notion of the declining marginal utility of dollars used on speech. After a certain level of spending, the utility of further spending declines. Incumbents, being better known to start, hit the point of declining marginal utility more rapidly than challengers. This point is not really controversial among empirical researchers. *See, e.g.*, Gary C. Jacobson, *Enough is Too Much: Money and Competition in House Elections, in* ELECTIONS IN AMERICA (Kay Schlozman ed., 1987) ("with the challenger's level of spending controlled, the effect of the incumbent's spending is, in virtually every model or election year, very small and statistically indistinguishable from zero."); John R. Lott, Jr., *Brand Names and Barriers to Entry in Political Markets*, 52 PUB. CHOICE 87 (1986); Steven D. Levitt, *Using Repeat Challengers to Estimate the Effects of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777 (1994). The incentives for incumbents in the legislature to set spending limits at a point above their own threshold, but below the threshold of challengers is thus tremendous. An example of such self-dealing was seen in the proposed voluntary spending limits included by Congress in the

Alleged Harms to Public Perception. Finally, a few words on the public perception evidence. The court of appeals accepted public opinion polls suggesting a dim public view of Vermont's elected officials and concluded that that constituted a constitutionally significant loss of confidence in democracy. 382 F.3d at 116. But the fact that the public may respond to leading questions and characterize disfavored behavior as "corrupt" should not be sufficient to establish a constitutionally meaningful appearance of corruption. Particularly where there is no evidence of actual corruption, the proper response to such opinion is to correct the misperception, not to restrict speech. Otherwise, were mere public opinion enough to justify overriding the First Amendment, it would effectively eviscerate the very purpose of a Bill of Rights, which "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court should instead insist on more meaningful indicia that the public believes certain practices are corrupt. For example, has it led them to change their votes for candidates for office? Has any candidate ever gained meaningful support by refusing to take contributions? The only evidence in that respect is the collapse of Vermont's voluntary expenditure limits because they had no electoral benefit to candidates. It would seem that while the public will tell a pollster that certain candidates are corrupt based on contributions and expen-

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1997-98 iterations of McCain-Feingold and Shays-Meehan. Evidence from three election cycles demonstrated that when challengers spent below such proposed levels, incumbents had an overwhelming advantage. Bradley A. Smith, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 69 (2001). There is no reason to think that Vermont legislators were any less self-serving in setting the limits in Act 64, or that the 10-15% differential in incumbent versus challenger spending limits is sufficient to overcome the inherent benefits of incumbency.

ditures, they do not appear to genuinely believe it, as evidenced by their actual voting patterns.[8]

D. The Genuineness of Vermont's Interest Is Doubtful Given Its Failure To First Try Non-Speech Solutions and the Radical Underincusiveness of Its Chosen Remedy.

If Vermont were genuinely concerned about such underlying economic disparities, and their ripple effects throughout all portions of society in which money plays a role, Vermont could address the problem at its source without the slightest impact on First Amendment rights – it could equalize income and wealth through taxation and redistribution. Alternatively, it could provide a tax deduction or even a direct tax *credit* for all contributions to candidates, perhaps with an aggregate cap on the total contributions each person could make in any election cycle. While those might be unpalatable and problematic solutions for many reasons, they would impose no burden on *First Amendment* rights, and hence would be a far less restrictive means of accomplishing such a goal. That Vermont has not done so suggests that its interest in equalizing influence that is a function of wealth is of questionable genuineness.

Furthermore, on Vermont's own reasoning, the remedy it has selected is wildly under-inclusive as its alleged interest extends well beyond candidate spending. Vermont's theory,

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[8] Indeed, public confidence or views on corruption seem to have little to do with campaign finance at all. *See* Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.")

flawed as it is, seems to argue that preferential access available to contributors generally, and to large contributors over smaller contributors, stems from elected officials' need for large amounts of campaign funds and hence the high value of contributions (and especially maximum contributions) given such demand. Expenditure limits, so the theory goes, would limit the demand for, and hence the value to elected officials of, campaign contributions.[9] (How such a limited decrease in the *overall* value of contributions would alter the *differential* value between large and small contributions is never explained.)

What is unusual about this theory is that the corruption linkage applies only to incumbents, not challengers, and could be solved by a rule applicable only to incumbents or even by single-term limits for holding office. In any event, Vermont applies its limits to challengers as well as incumbents presumably out of some sense of fair competition – self-serving and non-compelling as that rationale may be. That logic extends even to a self-financed challenger. Even though such a challenger cannot corrupt himself nor needs to rely on contributors or give them any preferences, his spending would presumably pressure the incumbent to favor contributors in order to compete. Thus, in order to stop the potential corruption of incumbents, Vermont has restricted the core and utterly harmless speech of wholly innocent challengers. As radical as that result is, Vermont's theory goes further.

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[9] Vermont's expenditure limit measure would not by itself lessen a candidate's *demand* for cash, particularly if the candidate is a challenger, unknown, or unpopular with the media. Rather, the candidate is simply disabled from satisfying that demand and would correctly feel that Vermont has tied her hands and limited her right to speak on her own behalf with such resources as the contribution limit regime would otherwise allow her. Hence we see, as noted by Judge Winter in dissent, the spectacle of a sponsor and coauthor of Act 64 who has now filed to declare his own legislation unconstitutional. *See* 382 F.3d at 158.

Capping the spending of opposing candidates will not by itself serve the interest claimed because Vermont presumes, erroneously, that the pressure on a candidate to solicit additional contributions comes only from the fundraising prowess of her opponent. But a wealthy *individual* could run an independent ad campaign for a challenger or against an incumbent, and that too would force the candidate to solicit additional contributions, or suffer the "unfairness" of being unable to respond. To relieve this pressure and unfairness, as in the case of challenger spending, Vermont would presumably have to limit the independent expenditures of all wealthy individuals in Vermont, a still further radical departure from precedent, but no less related to the alleged interests here than what Vermont has already done. Similar reasoning applies to independent spending by PACs; to spending by MCFL corporations; or to a program, editorial, or story running on a Vermont television, cable, or radio station or in any of several newspapers. Each of those sources could generate the same pressure on an incumbent to respond and to solicit contributions for that purpose; and if such further spending were forbidden, to ask that the opposing entities likewise be limited in their expenditures in the name of fairness, as some academics have suggested. *See* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (egalitarianism requires reconsidering the media exception to otherwise applicable campaign finance laws); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994) (proposal to treat media enterprises the same as are other corporations under campaign finance law).

Even viewing the interest and remedy in a light most favorable to Vermont, it cannot be achieved unless the Court would countenance many such measures in the future. That is the implication of Vermont's alleged interest, and it is a radical departure from First Amendment jurisprudence indeed. And while past restrictions in the campaign finance area de-

pended on a nexus between the practice being restricted and an office-holder, Vermont would stretch the notion of such a nexus to include anything or anyone to which an office holder felt the need to respond via costly speech, thus driving the need to raise money to respond. The breadth of Vermont's interest thus goes far beyond the already remarkable breadth of Act 64. That should cause this Court to reject enshrining such an interest as "compelling" and thus inviting such expansive restrictions in the future.

In sum, there is no existing relevant precedent that would not be radically altered or jettisoned if the Court were to uphold this measure. Vermont is free to experiment with the dollar values of its contribution limits and the anti-circumvention measures previously recognized by the Court to reach a proper balance. To uphold expenditure limits, however, would be to enshrine monetary equality as a constitutional maxim and to subject all politics to government control. But such a result is neither wise nor necessary because money is not an illegitimate resource in the political marketplace, even where its deployment is not always equal.

III. The Claimed Interest in Reallocating Candidate and Office-Holder Time Is Neither Compelling Nor Supported by a Proper Review of the Record.

Vermont's purported interest in "'assur[ing] that candidates and office holders will spend less time on fundraising and more time interacting with voters and performing official duties,'" 382 F.3d at 120 (citation omitted), is peculiar, at best, in that it places the State in the role of arbiter of which competing First Amendment activities – solicitation and advertising or personal voter interaction – are valuable and permissible for candidates, yet it does nothing to "assure" that candidates will actually spend any of their newly "protected" time on such preferred speech activities or on official duties.

It would appear, therefore, that Vermont simply dislikes the nature of modern political communications that rely heav-

ily on broad, though perhaps less personal, appeals and advocacy, and thus wishes to suppress them to some degree, regardless of what replaces them. Such an interest in suppressing disfavored modes of speech or in reallocating such speech as occurs is neither compelling, nor supported by the record.

A. Reallocating Candidate and Office-Holder Time Spent on First Amendment Activities Is Not a Compelling Interest.

Of the several aspects of Vermont's alleged time-protection interest, the notion of protecting office-holder time is simultaneously appealing and non-compelling. It is appealing in that there is undeniably a legitimate interest in having office holders spend all necessary time on their official duties. But it is not compelling in a number of ways.

First, it is, at best, nebulous and knows no bounds. Office holders have a variety of competing demands on their time, each of which may keep them from attending to their official duties to an optimal degree. Family demands, business interests, social engagements, or the mere desire to play golf all take time that might otherwise be spent on official duties. Likewise, the demands of campaigning, in whatever form or mode, will compete with an office holder's official duties, and it is inevitably the hard choice of the public official to decide whether his reelection chances are best served by spending time improving his performance in office or by campaigning for another term in office. If the interest in having office-holders spend more time on their duties were indeed *compelling*, it would seem to justify any number of regulations of anything that might compete for an office holder's time. Restrict family life or marital status? Why not, if the interest is truly *compelling*? Ban or severely restrict their *time* spent campaigning? That is certainly the next logical step. Indeed, given that Vermont claims to be concerned with the "arms race" to which office holders must respond, why not cap third-party independent expenditures as

well, especially on legislative issues, given that office holders would need to respond to such speech and hence be distracted from their duties. The alleged interest thus proves too much, and hence is far too general to be a compelling interest that can justify restrictions on core speech.

Second, the interest in official duties also proves too little to serve as a justification for Act 64. At a minimum, it plainly does not apply to spending by challengers not already holding state office. Their time will not go to official duties regardless, and hence protecting it seems rather meaningless. While it is true that a one-sided restriction on incumbent fundraising might seem unfair, any real unfairness is hardly self-evident given the inherent advantages of incumbency. That an office holder's job may constrain the time spent raising funds and campaigning for reelection seems to be a simple consequence of having assumed the greater duties of office, and should not be bootstrapped into a reason for restricting the speech of challengers. Intervening in the inherent balance of advantage and disadvantage as between challengers and incumbents in the name of "fairness" is quite a different interest, hardly seems compelling, and is distinctly *not* a task to be trusted to the incumbents themselves.

Third, while having office-holders perform their duties is a legitimate concern, the fact that Vermont has not taken more direct steps to accomplish that goal would seem to undermine its strength and the genuineness of Vermont's concern. Vermont could have done what every employer does with similar concerns – impose work hours and other obligations, require office holders to spend time at the state-house, require them to hold "office hours" for constituent service, and forbid them from conducting non-official business during working hours. While that seems rather heavy-handed, it is certainly less restrictive of First Amendment rights, however much it might bruise the sensibilities of elected officials.

Fourth, simply freeing up office-holder time offers no assurance that the time will indeed be spent on official duties as

opposed to anything else. That lack of assurance again undermines the genuineness of the interest, or at best converts it into the far more attenuated interest of giving office holders the *option* to spend more time on their duties. Furthermore, given that the means by which Vermont has approached this interest – limiting the most efficient means of communicating with large audiences of voters – office holders wishing to recoup some of the lost effectiveness of their campaign speech may in fact have to spend *more* time campaigning, and less time on official duties. The contradictory claimed goals embedded in this alleged interest thus lead one to question whether either goal is genuine.

As to the second aspect of the time protection interest – reallocating time to more desirable forms of personal political speech – Vermont's interest is affirmatively invalid.

First, this interest, of course, has nothing to do with the total time a candidate spends on speech, but rather with channeling a candidate toward a particular *type* of speech and away from solicitations and 30-second ads. But deciding what type of speech is best, either for candidates or for voters, is reserved for the speakers and the listeners themselves, and the claimed interest in overriding those choices is no interest at all. *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.").

Second, the interest, once again, knows no limits and hence would sweep too broadly to fit within the scheme of strict scrutiny. If the State can choose between solicitations coupled with television time and personal interaction by the candidate, there seems no reason it cannot decide that voters really need direct debates, and require that of candidates as well. Or perhaps the State could decide negative campaigning is not valuable and could ban, or severely burden, such speech. At bottom, an interest in deciding what speech is best

for candidates or the public is simply a rejection of the First Amendment on its face, it is not a cause to override it.

Third, the interest in reallocating speech is particularly non-compelling where the State disfavors methods of speech that the candidates themselves find most efficient and effective and forces candidates into speech that will not work as well or reach as far. That suggests that the State is actually trying to suppress the total quantity and reach of speech, to the detriment of the public that will now receive less speech, and to the detriment of challengers, who, as discussed earlier, reach the point of declining marginal utility of speech later than incumbents, and who require substantially more speech to overcome the advantages of incumbency. Notwithstanding the State's protestations that direct interaction with voters is superior and inspires confidence, that judgment is for the voters and candidates themselves, and to the extent any incumbent actually believes it, she can try it voluntarily in an election. The fact that few if any seem to have done so – recall the abandonment of voluntary spending limits – suggests that the legislators do not believe their own alleged interests.

Finally, reallocating candidate time away from more costly, yet more effective, forms of communication simply cedes the playing field to third parties with access to such communication. Candidates and issues will now be defined by the broader speech of others, whether from the mass media or independent expenders, rather than by their own speech, with inevitable resulting distortions.

Overall, therefore, the time-protection interest asserted by Vermont is non-compelling and in a variety of ways is affirmatively offensive to the First Amendment.

B. The Record Does Not Support a Significant Danger of Improper Time Allocation by Candidates and Office Holders.

As for the evidence allegedly supporting the time-protection interest, aside from some self-serving statements

by incumbents, 382 F.3d at 122-23, little evidence demonstrates that the caps would in fact reduce time spent on fundraising or that such time would be shifted to more valuable uses. At best the evidence might suggest an *opportunity* for such shifts, but missing is any evidence that time is actually diverted from official duties or "superior" speech. Thus, there is no evidence that candidates who spent and raised less money put their time to more valuable uses, either on official duties or on preferred modes of speech. Nor is there evidence that candidates in the past, when spending was supposedly lower, spent more time on preferred activities. Likewise, there is no evidence that in the few years that voluntary spending caps were followed there was any beneficial effect. And the eventual abandonment of those voluntary caps would at least suggest that candidates did not believe that they had better alternative uses for their time. The fact that there are numerous means to test and prove Vermont's hypothesis regarding the relation between candidate spending and candidate time allocation, yet there is no evidence from such available tests, strongly undermines the self-interested claims of incumbents that Vermont chooses to rely upon instead.

The dearth of evidence that the harms perceived and the benefits claimed are real, not mere conjecture, means that the State has failed to establish a compelling interest sufficient to justify its radical restriction on speech.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit finding Vermont's alleged interests compelling and remanding for further consideration should be reversed, the interests should be found non-compelling, and Act 64's candidate expenditure limits should be declared unconstitutional.

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In the

Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT AT AMERICAN UNIVERSITY IN SUPPORT OF RESPONDENTS

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February 7, 2006

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Interest of Amici Curiae[1]

Amici Curiae include noted experts on campaign finance law and practice, election administration, and international democratization. Amici possess many years of experience working to understand, defend, advance, and deepen election systems, civil society, and democratic institutions in the United States and abroad. They are political scientists and lawyers at the Center for Democracy and Election Management at American University in Washington, D.C.

The Center for Democracy and Election Management (CDEM) is an academic institution at American University, dedicated to the training of undergraduate and graduate students and mid-career professionals in the management of elections and best democratic practices, as well as the scholarly research of electoral administration, election system design and reform, and democratization. The mission of CDEM is education, training, research and support for individuals and institutions engaged in the democratic process and its improvement. It directed the Commission on United States Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, and has done extensive comparative work on election systems internationally.

CDEM is joined by the following elections experts:[2]

Dr. Robert A. Pastor (Director, Center for Democracy and Election Management, Vice President of International Affairs, and Professor at American University;

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] John Henderson undertook much of the research and the preparation of the first draft. Pastor and Raskin supervised the research and the drafting and edited the drafts and the final paper.

former Fellow and Founding Director, Latin American and Caribbean Program, The Carter Center);

John Henderson (Junior Fellow, Center for Democracy and Election Management, and Research Associate, Office of International Affairs, American University); and

Jamin Raskin, Professor, Washington College of Law, American University.

The long-running debate over whether to restrict election campaign expenditures has focused on whether such limitations would harm the practice of democracy — specifically, whether free speech would be limited, whether competitiveness would be diminished, and whether campaigns would be distorted, *i.e.*, not free or fair. Since such restrictions have not been implemented nationally in the United States and local examples are few and recent, it is difficult to answer these questions just by looking at the United States. The interest of Amici is to draw the best evidence from democracies abroad, particularly in those countries with traditions and institutions most like those of the United States. We do not claim that those experiences should guide American policy, but we do believe that it would be a grave omission not to study those cases and try to inform the U.S. debate as to the effects of restrictions on campaign expenditures in other countries.

Summary of the Argument

The Watergate scandal and the resignation of President Richard Nixon in 1974 led Congress to consider and approve far-reaching campaign finance rules, and those developments led other countries to review and modernize their own campaign finance rules. Though the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) accepted limits on contributions but not on expenditures, numerous other democracies introduced ceilings on both. As the Supreme Court revisits the question

of limits on campaign spending in this case, three decades of experience and a wealth of data are available from abroad for the court to assess regarding its possible impact in the United States.

Several conclusions emerge from examining the experience of other democracies with campaign spending limits:

- Spending limits certainly do not impair, and may even enhance democracy, electoral competition, and free speech and association, while clearly reducing the influence of money in politics.
- A majority of the freest, most democratic, and economically advanced countries in the world regulate campaign expenditures and contributions.
- In comparison, low-income and new democracies are less likely to do so.

Evidence from America's democratic colleagues suggests that common assumptions undergirding the case against limiting campaign expenditure in the United States are questionable, if not wrong. Let us review the evidence regarding each argument.

Argument

I. Campaign Spending Limits Do Not Hurt and May Even Enhance Democracy Abroad

A. Expenditure Limits Do Not Reduce Electoral Competition Nor Do They Disadvantage Challengers

The experience of democracies abroad with the best records on civil rights and freedoms, like Canada, the United Kingdom, and New Zealand, indicates that expenditure limits do not reduce and may even enhance the competitiveness of elections.

Election data at the constituency level, and a comparison of the specific campaign finance regulations in eight common law democracies for the period between 1997 and 2005, show that countries with limits on expenditures (Canada, the United Kingdom, New Zealand, and Malta) had more competition than those that lacked such limits (United States, Jamaica, Ireland, and Australia).[3] We define "competition" in

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[3] *See* Canada Elections Act, S.C. 2000, c. 9, § 441 (Canada), available at <http://www.elections.ca/loi/ref/act.pdf>; Political Parties, Elections, and Referendums Act, 2000, ch. 41, §§ 72-95, Sch. 9 (UK), available at <http://www.opsi.gov.uk/acts/acts2000/20000041.htm>; Electoral Act, 1993, §§ 213, 214B (N.Z.), available at <http://rangi.knowledge-basket.co.nz/gpacts/reprint/text/2005/an/031.html>; Malta: Chapter 102, The Electoral (Polling) Ordinance, available at <http://docs.justice.gov.mt/lom/legislation/english/leg/vol_3/chapt102.pdf >; The Commonwealth Electoral Act, 1918, 2004 (Australia), available at <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D0B22ED3162E922DCA256F71004E6776/$file/CwlthElectoral1918.pdf>; The Representation of the People Act (Jamaica), available at <http://www.eoj.com.jm/legislation/ropa.htm>; Electoral Act, 1997 (Ireland), available at <http://www.irishstatutebook.ie/ZZA25Y1997.html>; Law Library of Congress, *Campaign Financing in Various Foreign Countries, Comparative Summary and Analysis* (Document No. 2002-14013) (2002) (surveying the laws of eighteen countries, including Australia, Canada, and the United Kingdom). Although Ireland limits candidate

terms of four criteria, including incumbent reelection rate and percent of uncontested races.

The Watergate scandal inspired those democracies most similar to the United States to cap both spending and contributions for parties and candidates. These countries concluded that both sets of limits in place allowed a greater ability to influence the impact of money on campaigns. Though there is no simple way to eliminate this influence, the United States has found it more difficult to reduce the influence of money in its elections because it has been able to restrict only one side of the equation — contributions — rather than expenditures. Experience from abroad suggests that the best way to regulate campaign finance is to address both expenditures and contributions.

The specific expenditure limits in Canada, New Zealand, and the United Kingdom are:[4]

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expenditures, it does not limit party expenditures on elections. *See* the International Institute for Democracy and Electoral Assistance handbook (2001), "Funding of Political Parties and Election Campaigns," ("IDEA") at 206, available at <http://www.idea.int/publications/funding_parties/upload/full.pdf>. Although Jamaica limits candidate expenditures, there are no formal limits on party expenditures and candidate limits are not enforced. *See* Steven Griner and Daniel Zovatto (2005), "From Grassroots to the Airwaves: Paying for Political Parties and Campaigns in the Caribbean," Organization of American States, available at <http://www.ddpa.oas.org/publications/2005/fiapp/grassroots_airwaves/doc/pbl_grassroots_002_05_eng.pdf>. For an in-depth discussion of Australian campaign finance laws, and how they compare to laws in the United Kingdom and in Canada, *see* Talina Drabsch (2005), "Election Finance Law: An Update," Research Service Publications, available at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/08aa07f33136c901ca2570bd0003cb5c/$FILE/Election%20Finalpaper.pdf>.

[4] Data on campaign finance regulation is found in the IDEA. *See* n.3, *supra*. A summary of expenditure limits on political parties is at 205-208. The average size of a constituency in these countries (population divided by the number of legislative districts or congressional seats) is 38,696 for New Zealand, 70,811 for Canada, and 68,735 for the U.K. *See* U.S.

(a) *Canada*: the expenditure limit for parties fielding candidates in all 308 electoral districts in the 2004 election was $15,311,868; candidate expenditure for that election was limited at about $52,412 to $84,849 depending on the population of the district.[5]

(b) *New Zealand*: the expenditure limit in the 2005 election for parties fielding candidates in all 69 electoral districts was $2,336,000; the limit for candidates was $13,750.[6]

(c) *United Kingdom*: the expenditure limit in the 2005 election for parties fielding candidates in all 646 electoral districts was approximately $35,000,000; the limit for candidates was approximately $14,000.[7]

Of the eight common law democracies, each country that regulates expenditures (Canada, the United Kingdom, New Zealand, and Malta) also places limits on contributions, while Ireland and the United States limit only contributions, and

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Census Bureau, "International Data Base," available at <http://www.census.gov/ipc/www/idbnew.html>; CIA, "The World Factbook," available at <http://www.cia.gov/cia/publications/factbook/>. Of course parties and party funding play a more prominent role in parliamentary democracies and thus parties strategically use party funds in constituency races.

[5] *See* Elections Canada, "Election Handbook for Candidates," available at <http://www.elections.ca/content.asp?section=pol&document=index&dir=can/EC20190&lang=e&textonly=false>. All figures are transformed into U.S. dollars at the most current rate of exchange.

[6] Elections New Zealand, "Election Expenses and Returns," available at <http://www.elections.org.nz/elections/e5_party_return_expenses.html>.

[7] *See* Richard Kelley, "Election Expenses Limit," <http://www.parliament.uk/commons/lib/research/notes/snpc-03413.pdf>.

Australia and Jamaica regulate neither.[8] The different ways in which democracies most similar to the United States regulate campaign spending have important implications for electoral competition in these countries.

There are four widely used measures of electoral competitiveness: average size of electoral majority, percent of competitive races, incumbent reelection rate, and percent of uncontested races. Significantly, these show that U.S. legislative elections are much less competitive than elections held in other common law democracies.

An *electoral majority* is the difference between the winning candidate's percent of the vote and the vote percent of the next largest vote-getter. The smaller this difference is for any single race and for all races in an election, the more competitive the election is overall. Averaging each candidate's winning majority for each constituency, therefore, provides a measure of the overall competitiveness of an election.

FIGURE 1 reveals that 4 of the 5 countries (Canada, Malta, New Zealand, and the United Kingdom) with the most competitive elections (smallest average majorities of legislative race winners) place ceilings on candidate and party spending, and that all three of the countries with the least competitive elections (Ireland, Jamaica, and the United States) do not regulate overall spending. Moreover, countries with limits on expenditures average winning majorities of 20.71% across all of their elections as compared with average majorities of 25.45% in countries that do not regulate campaign spending. In other words, among this group, candidates in an average legislative race in countries *without* limits win elections by

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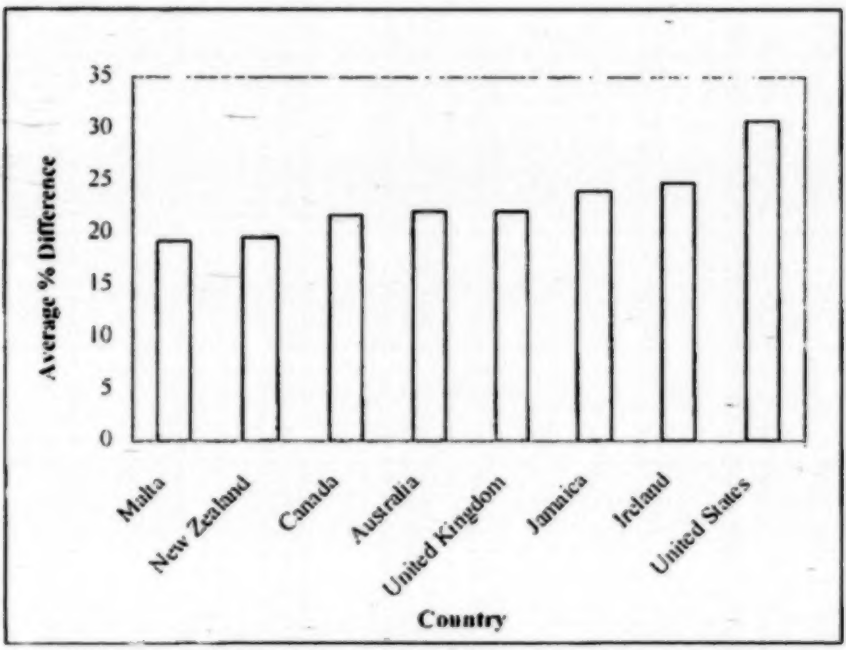
[8] Again, Jamaica (at least on paper, if not in practice), and Ireland regulate candidate, but not party expenditures. *See* n.3, *supra.*

greater majorities with less competition than in countries with spending limits.

Whatever the cause of greater competition, one cannot make the argument that capping expenditures automatically reduces competition because these cases suggest the opposite.

Figure 1: Electoral Competition in Eight Common Law Democracies, 1997-2005[1]

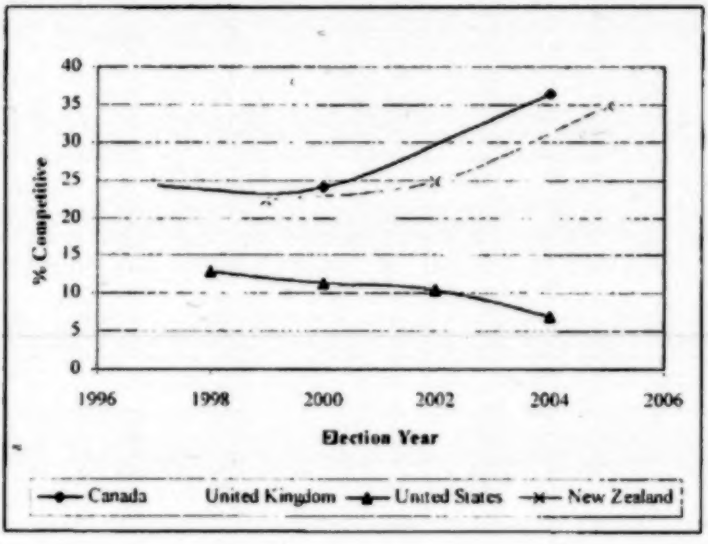


[1]**Average % Difference** is a measure of the size of the electoral majority of each winning legislative candidate over her nearest competitor. To calculate the statistic, each winner's percent of the vote is subtracted from the vote percent of the next largest vote-getter. These percent differences are then averaged. Smaller winning majorities mean more competition. U.S. elections include both House and Senate races.

Source: Australian Electoral Commission, <http://www.aec.gov.au/>; Elections Canada, <http://www.elections.ca/; Elections Ireland, <http://www.environ.ie/>; Jamaica Elections, <http://lanic.utexas.edu/la/cb/jamaica/>; Malta Elections, <http://www.maltadata.com/>; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives,<http://clerk.house.gov/>.

Another useful indicator of competitiveness is the percentage of all legislative races decided by fewer than 10% of the voters. FIGURE 2 below reports this measure of competitiveness across elections held by Canada, New Zealand, the United Kingdom, and the United States between 1997 and 2005.[9] The percentage of competitive races in countries with expenditure regulations (Canada, New Zealand, and the United Kingdom) appears *not* to have changed very much and the little that was changed was in a positive direction (*i.e.*, more offices were decided by close elections) between 2000 and 2005. Further, it is interesting to note that the competitiveness of elections in the United Kingdom increased slightly in 2005 just after the adoption of spending ceilings. By comparison, elections in this country are quite uncompetitive and over time have become even less so. For instance, in Canada's 2004 election, 36.5% of all constituency races were competitive; in the same year in the United States, only 7.0% were competitive.

Figure 2: Electoral Competition in Four Common Law Democracies, 1997-2005[1]



[9] Australia, Ireland, Jamaica, and Malta are excluded from further analysis because of the sporadic availability of district-level election data for the period.

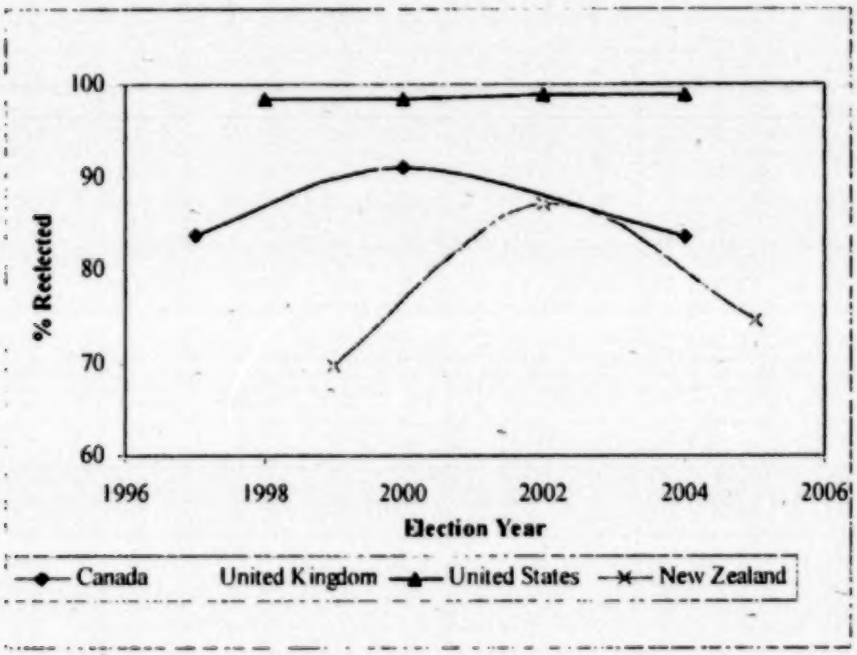
[1]**% Competitive** is the percentage of the legislative races (excluding uncontested races) in an election for which the winner is determined by a majority of less than 10% of the votes. U.S. elections include both House and Senate races.

Source: Elections Canada. <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

Even these two measures of electoral competition (average percent difference and percent competitiveness) do not fully capture the truly uncompetitive character of legislative races in the U.S. Two additional measures (incumbent reelection rate and percent of uncontested race) better illustrate the lack of competitiveness in this country.

The rate of incumbent reelection in Congress (see Figure 3 below) exceeds that found in all the other common law democracies with expenditure limits by substantial margins. By comparison, incumbents are reelected in the other common law democracies on average 83.1% of the time. Only the United Kingdom comes close to sharing the sort of incumbency election rates seen in the United States (around 99.0%), as in 2001 when 96.7% of British incumbents were returned to parliament. Yet not only are incumbents in the United States reelected far more often than in other countries, but a significant percentage of them go unchallenged in every election cycle. Over the last four legislative elections in the United States, 17.6% of incumbents went unopposed. Yet in the three most recent elections organized by each of the other three common law democracies, *every* constituency race was contested by multiple candidates. If in the United States the percent of a winner's majority in an uncontested race is understood to be 100.0%, then the average majority over the four most recent legislative elections would be 43.0%. Elections in the United States are far less competitive than in countries with spending limits.

Figure 3: Incumbent Reelection in Four Common Law Democracies, 1997-2005



% Reelected is the percent of incumbents returned to office that sought reelection. U.S. elections include both House and Senate races.

Source: Elections Canada, <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K. <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

The United States lags behind common law democracies in conducting elections that are contested and highly competitive (see Table 1 below). Whatever may account for this difference in the levels of competitiveness between the United States and the other common law democracies, it is clear that expenditure limits do not reduce competition. Indeed, elections in these three countries that restrict expenditures are more competitive than those in the United States, which does not.

Table 1: Competitiveness of Elections in Common Law Democracies, 1997-2005[1]

Country Election Year	Competition Index (a) avg. % diff.	Competition Index (b) % races <20%	Competition Index (c) % races >30%	Uncontested Elections % of total	Incumbent Reelection % reelected
Canada	**21.71**	**53.3**	**27.8**	**0.0**	**86.1**
1997	20.83	56.3	24.7	0.0	83.7
2000	23.84	47.7	31.3	0.0	91.0
2004	20.45	56.0	27.4	0.0	83.5
United Kingdom	**22.13**	**51.0**	**27.0**	**0.0**	**86.1**
1997	24.21	49.0	34.0	0.0	72.3
2001	22.85	49.0	28.0	0.0	96.7
2005	19.34	55.0	19.0	0.0	89.3
United States[2]	**30.76**	**28.5**	**51.0**	**17.6**	**98.7**
1998	29.60	36.1	44.9	21.8	98.5
2000	31.15	29.1	52.6	15.2	98.5
2002	31.24	25.0	54.7	18.6	99.0
2004	31.05	23.7	51.9	14.9	98.8
New Zealand	**19.70**	**52.6**	**18.5**	**0.0**	**77.1**
1998	20.85	47.8	19.4	0.0	69.6
2002	21.60	50.7	27.5	0.0	87.0
2005	16.65	59.4	8.7	0.0	74.6

[1]Data covers 3 or 4 legislative elections from each country.

[2]Includes both House and Senate races.

Source: Elections Canada, available at <http://www.elections.ca/; Elections New Zealand, available at <http://www.elections.org.nz/>; The Electoral Commission, U.K., available at <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, available at <http://clerk.house.gov/>.

B. There is No Evidence that Expenditure Limits Impair Freedom of Speech or the Press

The evidence from democracies abroad suggests that expenditure limits do not weaken civil and political rights or free speech and the press. Democracies that limit campaign spending safeguard their citizens' rights, liberties, and

freedoms, and for every year between 1995 and 2004, countries with expenditure limits on average earned higher "freedom scores" (according to Freedom House) than countries without the ceilings.[10] In fact, no democracy experienced a decline in its score for protecting free expression after introducing limits on expenditures, and some have actually seen marked improvement. Thus, it is not surprising that no successful challenge has yet been lodged against party and candidate spending provisions in any other democracy, nor has any court of highest appeal determined that limits on party or candidate expenditures reduces free speech or association.[11]

Freedom House (FH) annually judges the status of freedom for each country in the world, by assessing the degree to which a country fosters the norms and institutions that are fundamental to a free society. A "freedom score" is constructed accordingly to how well a country performs along two dimensions, *political rights* and *civil liberties*, and is based on a scale of 1 to 7 (most to least free). Countries with a score of 1 organize free and fair elections with multiparty competition, encourage free speech and press, protect minority rights, and support an equitable system of rule of law. The FH score is widely employed in political science research as one of the most authoritative, comprehensive, reliable, valid, and precise measures of freedom and democracy available. Amici base the subsequent analysis on a

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[10] Freedom House (FH) is a non-governmental organization that "supports the expansion of freedom in the world." *See* <www.freedomhouse.org>.

[11] Our thorough search for all available dates for Commonwealth and Foreign Nations (including Australia, Canada, New Zealand, and the United Kingdom) produced no cases in which a higher court held that campaign expenditure limits are *per se* unconstitutional. The closest case is *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, in which the Canadian Supreme Court *upheld* the constitutionality of restrictions on "third-party" spending.

sample of 84 "free" democracies by cross-referencing the FH "Freedom in the World" data with the campaign finance data compiled by IDEA, a Stockholm-based, non-governmental organization dedicated to democracy promotion.[12]

Levels of freedom in democracies with spending limits are high and improving. From 1995 to 2004, countries that limited campaign expenditures averaged political rights and civil liberties scores of 1.25 and 1.86, respectively, for a sum score of 3.11. Lower FH scores indicate greater freedom. (See Figure 4 below.) Democracies that adopted limits on expenditures also became freer over the period, witnessing a 9.7 percent increase in freedom (from a score of 3.07 to 2.77). If expenditure limits adversely affect free association and expression as some claim, then this trend should have been reversed or the scores should have reflected lower than average levels of freedom.

Figure 4 also shows that countries with limits on spending consistently garnered better freedom scores than those without limits for each year and for the period as a whole. Democracies without expenditure limits have average scores in political rights and civil liberties of 1.52 and 1.99 for the period, with a sum score of 3.51. Thus, on average, according to the most authoritative, comprehensive, reliable, valid, and precise measure of freedom used by political scientists, countries with campaign ceilings were actually 11.4 percent freer. The data suggest that campaign spending limits do not impair free speech and association.

In addition, no single democracy that regulates campaign spending witnessed a diminution, and some even experienced improvement in freedom. Indeed, the gains in freedom observed in Figure 4 above may be largely explained by examining four new democracies and their experience with

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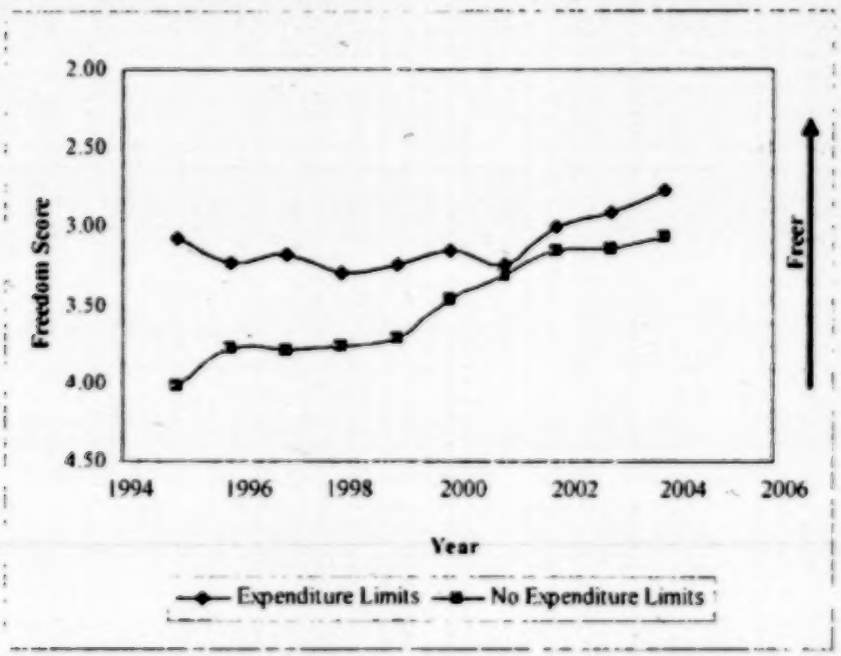
[12] IDEA (2001), "Funding of Political Parties and Election Campaigns."

spending limits. As Figure 5 illustrates, the protection of political rights and freedoms, including free speech and the press, improved in Brazil, Mexico, Taiwan, and Thailand either in the year expenditure limits were introduced or in the year of an election where the limits were first enforced. The United Kingdom also improved in 2001, the year in which the country overhauled its campaign finance system and introduced ceilings on spending. Though these gains are doubtless the result of a complex set of events that have reshaped democracies throughout the world, it is nonetheless revealing that improvements and not declines occurred in these countries in the very years that spending limits were adopted.

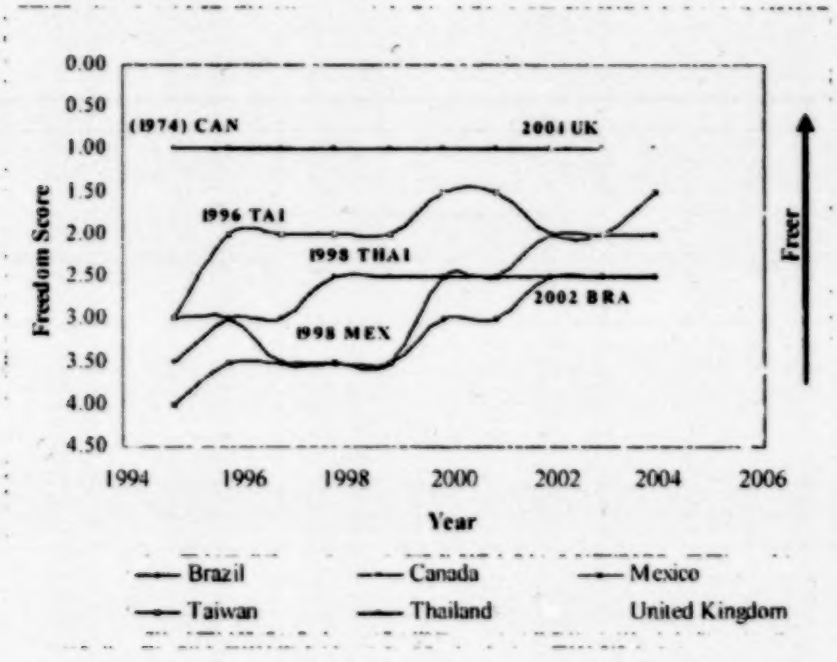
Figure 4: Freedom in Democracies with Expenditure Limits, 1995-2004[1]



[1]Freedom Score averages the countries' scores for political rights and civil liberties each and then sums the averages together into a composite score in order to minimize the differences between two populations.

Source: Freedom House (2005). "Freedom in the World," available at <www.freedomhouse.org>.

Figure 5: Levels of Freedom After Adopting Expenditure Limits, 1995-2004[1]



[1]Freedom Score takes the average of a country's political rights and civil liberties score.

Source: Freedom House (2005), "Freedom in the World," available at <www.freedomhouse.org>.

Another revealing finding is that among all of the democracies abroad with a tradition of judicial review, no court of highest appeal has come to the conclusion that spending limits are a *per se* violation of rights of free speech, association, or press freedom. Canada's campaign finance jurisprudence is of particular interest. Canada adopted spending limits for parties and candidates with the Elections Expenses Act of 1974, and subsequently extended the limits for nomination races in 2003. *See* Canada Elections Act, S.C. 2000, c. 9,[13] amended by S.C. 2003, c.19. Yet no direct constitutional challenge to the expenditure limits themselves has ever succeeded in any Canadian court of appeal.

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[13] Available at <http://www.elections.ca/loi/ref/act.pdf>.

In 1974 alongside the party and candidate spending ceilings, the Canadian parliament also prohibited third-party groups from spending money to directly support or oppose candidates or parties, though the government did not regulate money spent to promote political issues. This restriction on third-party spending sparked a series of legal challenges spanning two decades, which were finally decided in *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827. In *Harper*, the Supreme Court of Canada upheld the constitutionality of regulating interest-group spending, which at the time was capped at $3,000 per candidate and $150,000 for all election-related spending on candidates and parties. The Court held that limits in general did not violate citizens' freedom of expression, right to vote, or freedom to associate.[14]

The fact that no challenge has yet been lodged against party and candidate spending provisions reveals a remarkable consensus on their constitutionality among the countries' legal and political leadership. This consensus appears to be shared among the leaders of the other democracies abroad. Ironically, even though the Watergate scandal and the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 15, 18, 26, 47 U.S.C.), motivated many democracies to adopt their own spending limits, no higher court has since followed the arguments set forth in *Buckley* in striking down their constitutionality.

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[14] *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0827.html>.

II. Politically Advanced and Economically Developed Democracies are More — not less — Likely to Limit Expenditures and Contributions

Countries with the finest democratic traditions, that are most similar to the United States in institution and history, like Canada, the United Kingdom, and New Zealand, and that are highly developed, are precisely the ones that typically regulate expenditures and contributions. Of the 84 "free" democracies, 65 or 77.4% have campaign finance regulations.[15] Moreover, 53.8% or 14 of 26 advanced democracies limit contributions, expenditures, or both.[16]

In comparison, only 32.8 percent (19 out of 58) of *new* democracies regulate contributions, expenditures, or both. As these democracies become more consolidated, they are more likely to adopt limits on campaign expenditures and contributions.

Countries with expenditure and contribution limits are also more advanced economically. The average income (GDP/capita) of a democracy that limits expenditures, contributions, or both is $17,705 as compared with an income of $13,084 for a democracy without the limits. This confirms other evidence — that economic as well as political development increase the chances that a democracy will adopt expenditure

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[15] Regulations here include expenditure and contribution limits and direct and indirect forms of public campaign finance. If disclosure and other provisions are considered, the percentage of countries with some form of campaign finance regulation increases. IDEA (2001), "Funding of Political Parties and Election Campaigns," available at <http://www.idea.int/publications/funding_parties/upload/full.pdf>.

[16] Advanced democracies are those that were established before 1970. New democracies are those that were established after 1970. Some of the other democracies that limit expenditures include Belgium, France, Israel, Italy, Spain, and Portugal.

and contribution ceilings to combat the rising costs associated with running a campaign.[17]

Conclusion

Buckley v. Valeo appeared to equate campaign expenditures with free speech, implying that limiting the first would also limit the second. Because of that ruling, the United States does not have the experience to test the validity of the equation, but there are many experiences abroad that allow us to draw some conclusions. In this brief, we have surveyed those cases, focusing particular attention upon those countries with political traditions and institutions most like those of the United States. We have found no evidence that limits on campaign expenditures impair the freedom of speech. Indeed, the evidence points in the opposite direction: those countries that have restricted campaign spending have higher levels of political freedom, and those that have adopted such restrictions have improved their levels of freedom. If the United States limits campaign spending, there would be no guarantees that freedom and competition would be enhanced, but fears of a loss of freedom and competition are clearly unwarranted.

Respectfully submitted,

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[17] IDEA (2001), "Funding of Political Parties and Election Campaigns," pp 173-176; Herbert Alexander (1994), *Comparative Political Finance Among the Democracies*, Boulder: Westview Press, pp 1-11.

FEB 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1528, 04-1530 and 04-1697

In The

Supreme Court Of The United States

NEIL RANDALL, et al.,
Petitioners,
v.
WILLIAM H. SORRELL, et al.,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, et al.,
Petitioners,
v.
WILLIAM H. SORRELL, et al.,
Respondents.

WILLIAM H. SORRELL, et al.,
Cross-Petitioners,
v.
NEIL RANDALL, et al.,
Cross-Petition Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, ARKANSAS, CALIFORNIA, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, RHODE ISLAND, WISCONSIN, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Cross Petitioners and urge this Court to affirm the judgment below.

This case presents two exceptionally timely and important questions: (1) whether States may, consistent with the Constitution, enact campaign finance reforms that impose mandatory limits on the amount that candidates for state office may spend on their election campaigns; and (2) whether States will continue to have the ability to enact contribution limits, which have become a mainstay of state campaign finance reform efforts, to prevent corruption and the appearance of corruption in the electoral process.

The Amici States have a vital interest in the resolution of these issues because they will directly impact their ability, and the ability of all States, to enact critically needed campaign finance reforms. Since 1976, when this Court struck down campaign spending limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Amici States have seen an astronomical increase in campaign spending by political candidates that has fueled a generally held public perception that money buys power. The States have further found that the intense pressure to raise funds greatly reduces the time that elected officeholders have available to serve the public and that electoral competition is diminishing because running for office has become a financial impossibility for an ever-increasing number of Americans.

To combat these extremely serious problems, which threaten to undermine the integrity of the democratic process at all levels of government nationwide and are getting worse by the day, it is essential that the Amici States, and all States, have the ability, if they so choose, to

enact campaign finance reforms such as Vermont's that include both contribution limits and expenditure limits. As the "laboratories of democracy," the States' ability to experiment in this regard is crucial if viable solutions to this national crisis are ultimately to be found. Accordingly, the Amici States have a vital interest in ensuring that the constitutionality of Vermont's legislation is upheld and may serve as a model for similar campaign finance reform efforts in other States.

SUMMARY OF ARGUMENT

In 1997, in response to deep public concern that unlimited fundraising and campaign spending was undermining the integrity of Vermont's electoral system, the Vermont legislature adopted the 1997 Vermont Campaign Finance Reform Act ("Act 64" or "the Act"), codified at 17 V.S.A. §§ 2801 – 2883 (2005). The Act constitutes a comprehensive reform of the State's campaign finance laws and includes limits both on the amount that a single source, political committee, or political party may contribute to a candidate for state office, and on the amounts that such candidates may spend on their campaigns. 17 V.S.A. §§ 2805, 2805a.

Vermont found that comprehensive campaign finance reform was essential because the skyrocketing costs of campaigning for elective office, fueled by an "arms-race" mentality in which candidates felt compelled to raise ever-increasing amounts of money to avoid being outspent by their opponents, had reduced public confidence and involvement in the electoral process, increased the appearance that candidates and elected officials would not act in the best interests of Vermont citizens, caused candidates and elected officials to spend inordinate amounts of time fundraising, resulted in candidates and elected officials responding and giving access to large contributors over small contributors and non-contributors,

and rendered running for public office a financial impossibility for many Vermonters. 1997 Vt. Laws P.A. 64. Concluding that it had compelling state interests in addressing these concerns, Vermont adopted Act 64.

Although the present lawsuit focuses on Act 64 and the record of Vermont's specific experience, it is vitally important to recognize that the deep-seated problems that threaten the integrity of Vermont's electoral process, and led to the adoption of Act 64, are by no means unique to Vermont. On the contrary, they plague virtually every State in the country and are seriously eroding public confidence in representative government nationwide.

Although the States have tried myriad reforms, they have not, to date, succeeded in controlling effectively the rampant corruption, extraordinary fundraising pressure, or loss of equal opportunity for political participation caused by limitless campaign spending. Expenditure limits, however, hold particular promise as a means of addressing these concerns. While each State must assess for itself whether expenditure limits will serve its unique needs, it is essential that the States have the choice. Numerous States are actively pursuing reforms that include such limits and public support for such measures is extraordinarily high. Given the urgent need to restore public confidence in the integrity of our democratic process, the Amici States urge this Court to affirm the judgment of the Second Circuit upholding the constitutionality of expenditure limits and permit States nationwide to experiment with these critically-needed reforms.

Although expenditure limits are a key component of Act 64, the Act also imposes contributions limits. Unlike expenditure limits, which have been largely unused since *Buckley* due to uncertainty over their constitutionality, contribution limits have become well-established tools in the States' efforts to eliminate corruption and the appearance of corruption in the electoral process. Although

the petitioners would have this Court abandon its well-established precedents upholding the constitutionality of contribution limits, and thereby threaten both existing limits in other States and the ability of all States to adopt such limits in the future, nothing warrants such drastic revision of the law. On the contrary, this Court should affirm the constitutionality of contribution limits in general, and Vermont's in particular, recognizing that it is the legislature, not the judiciary, that is best suited to determine in each case the precise limit that will best promote the States' interest in preventing corruption and the appearance of corruption in the electoral process.

ARGUMENT

I. THE ABILITY TO EXPERIMENT WITH EXPENDITURE LIMITS IS VITALLY IMPORTANT TO THE STATES, ALL OF WHICH FACE THE SAME THREATS TO THE INTEGRITY OF THE DEMOCRATIC PROCESS AS VERMONT.

In adopting Act 64's expenditure limits,[1] Vermont sought to address multiple, serious problems threatening the integrity of its electoral system, including: (1) the corruption and appearance of corruption that result when candidates become beholden to financial constituencies capable of generating large combined contributions to the candidates' campaigns; (2) the inability of candidates and officeholders to interact with voters and perform their

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[1] Act 64 limits expenditures by candidates for the following offices to the following amounts: governor - $300,000; lieutenant governor - $100,000; other state-wide office - $45,000; state senator - $4,000 to $16,000 (depending on the number of senators in the district); county office - $4,000; state representative, multiple-seat district - $3,000; and state representative, single-seat district - $2,000. 17 V.S.A. § 2805a. In 2005, the legislature amended the law to provide for increases in these limits according to the Consumer Price Index in each election cycle beginning in July, 2005.

official duties because of the inordinate amounts of time that they are required to spend fundraising; and (3) the loss of equal participation in the electoral process that results when citizens are financially unable to run for office. Although the evidence in this case focuses on Vermont's experience, seemingly daily accounts across the country of government scandals, corruption probes, influence-peddling by elected officials, special interest lobbyists wining and dining with candidates at one multi-million dollar fundraiser after another, entrenched incumbents running unopposed, and abysmal voter turnouts have made all too clear that Vermont's experience is indicative of a national crisis.

A. Since *Buckley*, There Has Been A Dramatic Escalation In The Cost Of Campaigning For Elective Office.

In the thirty years since *Buckley*, the costs of running for elective office, whether at the national, state, or local level, have increased astronomically. According to statistics compiled by the Center for Responsive Politics, the money spent by presidential and congressional candidates in the 2004 federal elections totaled a record-breaking $4 billion. Center for Responsive Politics, *Campaign Finance Reform* (Jan. 19, 2005)(available at www.opensecrets.org/ news/ campaignfinance/index.asp). This astounding figure represents a 30% increase over the $3 billion spent only four years earlier in the 2000 federal elections. *Id.* Whereas the average winning Senate campaign cost $610,000 in 1976, Wertheimer and Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994), by 2004 the average cost had risen to $7.84 million, with the top spender pouring more than $28 million into his campaign. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/ topspend.asp?cycle=2004); Mark C. Alexander, *Let Them*

Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials, Loyola University Chicago Law Journal, Vol. 37, note 9 (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid =816244). In the 2004 presidential campaign, President George W. Bush spent $345 million, up from $185 million four years earlier, making the 2004 presidential election the most expensive campaign in history. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/topraces.asp).

In state elections, the increases are equally alarming. For example, in the 54 gubernatorial elections held between 1977 and 1980, the total expenditures, expressed in 2004 dollars, were $507.8 million. Thad Beyle, *Governors: Elections, Campaign Costs and Powers*, pp. 197-198, The Book of the States (2005 ed.). Just over two decades later, in the 53 gubernatorial elections held between 2000 and 2003, the total expenditures in 2004 dollars had skyrocketed to $1,148 million -- an increase of 126%. *Id.* In the only two gubernatorial races in 2005 -- in Virginia and New Jersey – the candidates smashed all previous spending records for a governor's race in both states by more than 33 and 100 percent respectively. Bob Lewis, *Kilgore's $22 Million Busts Fundraising Record*, Associated Press (Oct. 31, 2005) (available at www.vpap.org/vpa/AP11012005.htm); David Chen and David Kocieniewski, *As Multimillionaires Duel, Corzine Outspends Forrester*, The New York Times (Nov. 5, 2005)(available at www.nytimes.com/2005/11/05/nyregion/metrocampaigns/05finance.html). In New Jersey, the record expenditures were attributed in part to the fact that both candidates were multimillionaires who had eschewed the State's public financing system and poured millions of dollars of their personal funds into their campaigns. *Id.*

Such limitless expenditures are fueled by the fact that the candidate who spends the most money generally wins. For example, in the 2004 congressional primaries, 91% of the candidates who raised the most money won their races. U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 8 (Oct. 2004)(available at www.uspirg.org/reports/WealthPrimary2004.pdf). Of the 11,400 candidates who ran in general-election contests for state legislative seats in 2003-2004, 85% of the winning candidates raised the most money in their races. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 3 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). And in the 2004 gubernatorial races, 66% of the biggest spenders won. *Id.* at 6. Given the high correlation between outspending one's opponent and winning, there is no reason to believe that the pressure to spend ever-increasing amounts to attain elected office will lessen in the absence of significant reforms to the current system of campaign financing.

B. All States Have A Compelling Interest In Deterring The Corruption And The Appearance Of Corruption In Elective Politics And Government That Is Caused By Unlimited Campaign Expenditures.

Based on almost six months of hearings and testimony from 145 witnesses, the Vermont legislature found that "[l]arge contributions and large expenditures by persons or committees . . . reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." 1997 Vt. Laws Pub. Act 64 (H. 28)(finding (a)(9)). This loss of public confidence in the electoral system results when candidates and elected officials, faced with a limited number of campaign contributors and a constant fear of being outspent, become

dependant on special interest groups that can generate large combined contributions. Concerned that they cannot oppose these groups without being cut off from needed funds, the candidates and elected officials set their agendas and make decisions based on the desires of the special interests to whom they are beholden, rather than on the needs of the citizens whom they represent. The result is that "citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power." *Landell v. Sorrell*, 382 F.3d 91, 119 (2d. Cir. 2004). Given evidence that "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns," *id.* at 119 (emphasis omitted), the Second Circuit appropriately concluded that "Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates." *Id.* at 118.

The same is true across all States and all political affiliations. States are finding, as Vermont has, that candidates and elected officials have become dependant on special interest groups that can generate large combined contributions and that official decision-making with regard to everything from state contracts and investments to state employee hiring and promotions is all too often influenced by campaign contributions.

In Connecticut, such corruption was rampant in the administration of former Governor John Rowland, resulting in Rowland's resignation as Governor on July 1, 2004 under threat of impeachment for illegally doling out millions of dollars in state contracts to companies and individuals who had, among other favors, contributed significantly to his election campaigns. One such

contributor, the Tomasso construction group, marshaled over $435,000 in contributions from family members, associated companies and subcontractors to Governor Rowland's two re-election campaigns and state and national political party accounts. Common Cause, *The Rowland Corruption Trail Begins On The Campaign Trail*, p. 1, Jan. 20, 2004 (available at http://ccag.net/Democracy/final%20cc%20tomasso%20report.pdf). Included in the Tomassos' contributions were significant donations by TBI Construction, which began contributing heavily to Rowland's re-election campaign in 1998. *Id.* at 4-5. In the following four years, the Rowland administration awarded TBI three major no-bid state contracts worth more than $125 million, appointed the company's president to a juvenile justice state advisory panel, despite a seeming lack of qualifications or experience, and seated the company's executives with the Governor and his wife at social functions. *Id.* at 5. In short, the company's contributions bought access, influence and favoritism.[2]

Similar "pay-to-play" corruption infected the office of former Connecticut State Treasurer Paul Silvester, who is currently serving a federal prison term for misusing his authority over Connecticut's $20 billion pension fund to generate millions of dollars in kickbacks and campaign contributions. Edmund Mahoney, *Silvester to Spend 28 More Months In Jail*, Hartford Courant, p. A1, Nov. 21, 2003; Associated Press, *Rowland Campaign Benefited*

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[2] The same was true of numerous other major Rowland contributors. For example, after energy giant Enron and its associates began contributing regularly to Governor Rowland's election campaigns, three Enron executives secured a private meeting with the governor and ultimately obtained the equivalent of a $220 million unsecured loan from the State. Alison Leigh Cowan, *The Garbage and the Governor: Enron in Impeachment Inquiry*, New York Times, section A, p. 1 (March 16, 2004); *see also* Connecticut Common Cause, *The Gift That Keeps Giving: Campaign Contributors Benefited From Tax Breaks* (April 12, 2005)(available at www.commoncause.org/atf/cf/{FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/KeyAir-Sousa%201.pdf).

From Treasurer Contacts, Jan. 18, 2000. Among other tactics, Mr. Silvester demanded that firms seeking lucrative state contracts to manage state pension investments contribute hundreds of thousands of dollars to his own campaign and that of Governor Rowland. *Id.*; Edmund Mahoney, *State Treasurer Scandal Finally Comes To Trial*, Hartford Courant, p. A1, June 13, 2003.

A similar ongoing scandal in Ohio, dubbed "Coingate," centers around Thomas Noe, a rare coin dealer and political fundraiser who has contributed more than $200,000 over the past fifteen years to prominent state and federal elected officials. Using his contributions to gain influence, Mr. Noe won highly coveted gubernatorial appointments to the Ohio Board of Regents and the Ohio Turnpike Commission, before garnering an unprecedented $50 million investment of state money in his rare coin fund by the Ohio Bureau of Workers' Compensation. James Drew and Steve Eder, *Voinovich Appointment Started Noe's Rise*, Toledo Blade (Sept. 4, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=20050904/SRRAECOINS/309040001). Soon after receiving the investment, Mr. Noe began transferring large sums to his personal accounts and making thousands of dollars in political contributions to the governor, state auditor and other top elected officials. Steve Eder and James Drew, *Noe Transferred Coin Cash Before Giving To Politicians*, Toledo Blade (Oct. 9, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20051009/SRRARECOINS/310090001); James Drew and Steve Eder, *Petro: Noe Stole Millions*, Toledo Blade (July 22, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20050722/SRRARECOINS/50722004). State and federal investigations subsequently revealed that $13 million out of the $50 million investment in the coin fund was missing and unaccounted for, *id.*, and that Mr. Noe was laundering money, using 24 individual "donors," to whom he gave cash, as conduits to funnel over $45,000 into a presidential

campaign. Mike Wilkinson and James Drew, *Noe Indicted: GOP Backer Accused Of Laundering Cash*, Toledo Blade (Oct. 28, 2005) (available at www.toledoblade.com/apps/pbcs.dll/article?AID = /20051028/SRRARECOINS/310280002). Summing up the situation, an Ohio teacher railed that "[p]ay-to-play politics not only exists, it's out of control. . . .Wealthy people have special access to politicians that I don't have. I can't play because I can't pay." Jim Provance, *Vote Reform Helps Stall Ohio Spending Cap*, Toledo Blade (August 10, 2005).

The public has voiced similar outrage over official corruption in Tennessee, where a recent investigation revealed that two-thirds of the Tennessee Highway Patrol officers tapped for promotion under Governor Phil Bredesen contributed to his campaign or had family members or political patrons who did. Brad Schrade, *Troopers With 'Politics' Win Out On Promotions*, The Tennessean (Nov. 13, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20051113/NEWS0201/511130390). Among those with such connections, over half were promoted over troopers who scored better on impartial exams or rankings. *Id.* Campaign donors who were not troopers were rewarded in other ways, such as by being given photo identification cards that appeared identical to those held by Tennessee Highway Patrol officers. Trent Seibert and Brad Schrade, *Trooper-like Badges, IDs Go To Well-Connected*, The Tennessean (August 7, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20050807/NEWS0201/508070403). To the average citizen, the cards sent a clear message that there was a different set of rules for the well-connected, who could brandish the cards to obtain official favors and avoid being arrested. *Id.*

While such corruption and apparent corruption is horrifying in itself, what is particularly alarming is that it has become so common and has fueled a generally held

public perception that money buys power and that those with power do not represent those without money. In 1997, almost half of all Americans believed the influence of money in politics seriously undermined democratic ideals by leading elected officials to vote against their constituents' interests and support policies they did not personally believe were best for the country. Center for Responsive Politics, *A National Survey of the Public's Views on How Money Impacts our Political System*, conducted by the Princeton Survey Research Associates (June 1997)(available at www.opensecrets.org/ pubs/survey /top.htm).

More recent surveys suggest that such cynicism is growing. *See, e.g.*, The Study Commission on Public Funding of Campaigns in Maryland, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, Dec. 2002 (available at www.capc.umd.edu/ rpts/MDCamp FinSrvy.pdf)(among Maryland voters, 92% believe that campaign contributions influence the policies supported by state elected officials and 83% believe that contributors have greater access to elected officials than those who do not contribute); Zogby International, *Views of Connecticut Voters On Public Financing Legislation*, p. 4 (May, 2005) (available at www.commoncause.org/atf/cf {FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/zogby% 20poll.pdf) (62% of Connecticut voters believe that elected officials in their state are more concerned with the needs of those who pay for their campaigns than with the needs of those who do not); Pew Research Center poll (Feb. 2004) (available at www.publicagenda.org/issues/pcc_detail.cfm ?issue_type=campaign_finance&list=3)(59% of Americans are "very much" bothered by the amount of money that candidates spend on campaigns); Pew Research Center poll (August, 2003)(available at www.publicagenda.org/issues/ pcc_detail.cfm?issue_type = campaign_finance&list = 12) (59% of Americans believe that most officials do not care what they think); CBS News poll (Jan. 2001)(available at

www. public agenda. org/ issues/ pcc. cfm?issue_type= campaign_finance)(70% of Americans think that public officials make or change policy decisions as a direct result of money that they receive from major campaign contributors).

Because "the avoidance of the appearance of improper influence is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent," *Buckley*, 424 U.S. at 27 (internal quotation marks omitted), it is essential that States have the means to prevent such influence through reforms that curb the arms race mentality and diminish candidates' dependence on large contributions from special interests.

C. All States Have A Compelling Interest In Enabling Elected Officials To Spend Less Time Fundraising And More Time Serving The Public.

The Amici States also share Vermont's compelling interest in curbing the staggering costs of campaigning in order to permit officeholders to spend less time fundraising and more time interacting with voters and performing official duties.

The Second Circuit concluded that the evidence in Vermont was "clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." *Landell*, 382 F.3d at 122. In particular, the unrelenting need to raise funds compels officials to spend time fundraising and meeting with donors rather than attending to their official duties, *id.* at 122-123, and to respond and give access to contributors who make large contributions in preference to those who make small contributions or no contributions. *Id.* at 122 n. 16; 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(2)).

This time problem afflicts elected state and local officials nationwide. *See Rosenstiel v. Rodriquez*, 101 F.3d

1544,1553 (8th Cir.1996), *cert. denied*, 520 U.S. 1229 (1997)(recognizing Minnesota's compelling interest in reducing the time candidates spend fundraising, thereby increasing the time available for discussion of the issues); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993)(recognizing Rhode Island's valid interest in freeing candidates from the pressures of fundraising); Alaska Stat. § 15.30.160(1); Ariz. Rev. Stat. § 16-940(B)(8)("[t]he people of Arizona find that our current election-financing system . . . [r]equires that elected officials spend too much of their time raising funds rather than representing the public").

In Connecticut, complaints about the massive amounts of time that must be devoted to fundraising have been a common refrain among legislators pushing for campaign finance reform throughout the past decade.[3] In 1997, Representative Bysiewicz (now Connecticut's Secretary of State) explained that not only were the costs of running for state office spiraling out of control, but:

> [w]e also have the problem of . . . candidates spending too much time raising money. Conventional wisdom says that it costs about $3 million to run for governor. What does that mean? That means $29,000 a week for two years or $4,200 a day for two years. And that means that what you end up [with] is candidates who have to spend all their time raising money and they don't have any time to raise issues. And for those candidates who are incumbents they will be

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[3] In December, 2005, Connecticut enacted a campaign finance reform law that provides for public financing and is a vital step towards correcting the problems plaguing Connecticut's electoral process. 2005 Conn. Pub. Acts No. 05-5 (October 25, 2005 Special Session). As noted below in section E, however, voluntary public financing systems have not solved the time problem.

> spending lots of time raising money and have less time to do the people's business.

40 Conn. H. R. Proc., pt. 8, 1997 Sess. 2707 (May 14, 1997).

Unfortunately, the situation is not improving. In pressing for reform, former Connecticut gubernatorial candidate William Curry lamented that "every hour that we spend calling big contributors that we don't spend learning about the real problems in the real lives that people face every day is an hour lost to democracy as far as I'm concerned." Conn. Joint Committee Hearing, Government Administration and Elections Committee, p. 538 (March 11, 2002)(remarks of William Curry). Another Connecticut legislator has summed up the problems as follows:

> [E]veryone can acknowledge that the influence and the time taken in the preoccupation with fund raising is time taken away from what should be our preoccupation with issues, and debate, talking to our constituents, debating with each other the issues, and indeed campaigning hard. Yet, in race after race, campaign after campaign, we have seen more and more pressure put on each and every one of us to *raise funds* and then *raise funds* and then *raise funds* and then *raise funds*.

43 Conn. S. Proc., pt. 4, 2000 Sess. 1021-1022 (April 12, 2000)(remarks of Senator Sullivan)(emphasis added). The result of such relentless pressure is that, across the country, "all too often [legislators] become fund-raisers first, and legislators second." 138 Cong. Rec. § 115 (daily ed. Jan. 6,1987)(statement of Sen. Byrd).

D. The States Have A Compelling Interest In Ensuring That All Citizens Have An Equal Opportunity To Participate In The Political Process.

A third consequence of the intense pressure on candidates to outspend their opponents, which the Second Circuit did not reach in Vermont's case, but which poses equally as great a threat to the integrity of the electoral process as corruption and time consumption, is the loss of equal opportunity for citizens to participate in the electoral process.

Democracy is premised on the belief that all citizens should have an equal voice in government. As a result, this Court has consistently struck down barriers to equal participation of voters and candidates alike. *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)(striking down poll taxes); *Bullock v. Carter*, 405 U.S. 134 (1972)(striking down candidate filing fees); *Lubin v. Panish*, 415 U.S. 709 (1974)(striking down candidate filing fee). Yet, despite this ideal, unlimited campaign spending has made running for office a financial impossibility for most individuals, not just in Vermont, but across the country. *See* 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(1)); Alaska Stat. § 15.30.160(3)("[t]he people of the State of Alaska hereby find and declare as follows: . . . entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the people of Alaska"); Ariz. Rev. Stat. § 16-940(B)(7)("[t]he people of Arizona find that our current election-financing system: . . . [d]rives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special interest funding"); Colo. Rev. Stat. § 1-45-102 ("[t]he people of the state of Colorado hereby find and declare that . . . the rising costs of campaigning for political office prevent qualified citizens

from running for political office"); Neb. Rev. Stat. § 32-1602(1)("[t]he Legislature [of Nebraska] finds that the cost of running for statewide office and legislative seats has risen greatly and that many qualified candidates are excluded from the democratic system as a result of such rising cost"); R.I. Gen. Laws § 17-25-18 ("the general assembly [of Rhode Island] finds that the need to raise ever larger sums of money to effectively compete for general office threatens the essence of our democratic system by excluding many well qualified candidates").

In particular, the need for ever-increasing campaign funding means that millionaire candidates are increasingly common. In the 108th Congress, for example, 42% of senators and 25% of representatives were millionaires, compared with less than 1% of the citizenry at large. U.S. PIRG Education Fund, *Look Who's Not Coming To Washington*, p. 6 (Jan. 2005)(available at http://uspirg.org/reports/lookwhos2005.pdf). In the 38 gubernatorial races in 2002, 21 candidates contributed $1 million or more to their own campaigns. The Institute on Money in State Politics, *State Elections Overview 2002*, p. 6 (Nov. 2004)(available at www.followthemoney.org/press/Reports/200411181.pdf). It has been found that "millionaire candidates distort the electoral process and make it considerably more difficult for ordinary citizens to run for office because the level of funds needed to compete with millionaires is beyond the reach of most candidates." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/democracy/democracy.asp?id2=5977&id3=CFR&).

Would-be candidates lack the funds not only to compete with millionaires, but also to compete with incumbents. Incumbent candidates generally have far greater access to campaign funds than their challengers and have enormous financial war chests that discourage new faces from even attempting to run for office. The result is

that, in many cases, incumbents face no competition at all. *See* U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 4 (Oct. 2004)(finding that 65% of the 2004 congressional primary races were uncontested).

Unlimited campaign spending, which permits millionaire and incumbent candidates to spend as much as they can raise, reduces the number of people willing to run and, as a result, limits voters' choices. As one scholar has observed, the result is that "unlimited spending, rather than protecting speech, may actually reduce both the amount and the diversity of electoral speech that voters hear." Richard Briffault, *Special Series on Election Law: The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 Fordham Urb. L. J. 399, 434 (May 2005). Accordingly, States have a compelling interest in limiting campaign expenditures in order to preserve the right of citizens to participate equally in the electoral process that is crucial to democratic government.

E. Expenditure Limits Have The Potential To Solve The Deep-Seated Problems Caused By Unlimited Campaign Spending.

Although States have experimented with a wide variety of campaign finance reforms, the reforms to date have not solved the problems of corruption, time loss, and diminished opportunity to participate in the electoral process that result from the ever-increasing costs of campaigning.

In particular, contribution limits alone have not been sufficient. As the Second Circuit observed in Vermont's case, contribution limits have not solved the corruption problem because "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them." *Landell*, 382 F.3d at 119.

Public financing systems, in which candidates receive public funding if they agree to abide by spending caps, are likewise unable to remedy the problems caused by runaway campaign spending because such systems, to date, have allowed candidates to opt out. *See* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials*, Loyola University Chicago Law Journal, Vol. 37, § III.B (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid=816244) Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1317-1318 (May, 1994). Under such systems, candidates with extensive personal wealth or a particular ability to raise funds beyond those that would be provided through public financing tend to forego public funds and seek to outspend their opponents because outspending one's opponent is typically the key to winning. This was the case in the 2005 gubernatorial race in New Jersey between Senator Corzine and Mr. Forrester. Both candidates were millionaires, who opted out of available state public financing in order to be free to spend unlimited amounts of money on their campaigns. Similarly, both major party presidential candidates in the 2004 primary opted to forego available public financing. As one scholar has accurately observed, "[t]he inability to force compliance is the gaping hole in the efficacy of public financing." *Id.*

Whereas contributions limits and public financing have failed to end the corruption, endless fundraising, and lack of equal participation spawned by ever-increasing campaign costs, expenditure limits have the potential to address all of these problems. In particular, expenditure limits eliminate the possibility of being vastly outspent that leads to the "arms race" mentality among candidates and elected officials. *Landell*, 382 F.3d at 127. According to

Vermont legislators and officials who testified in the present case, limits that prevented them from being outspent would increase their willingness to take positions that their contributors opposed. *Id.* at 127. In other words, if they are not going to be outspent, legislators are less likely to become beholden to the special interests that are so vital to their ability to raise limitless funds.

Similarly, capping expenditures reduces the time that candidates must spend fundraising, thereby freeing them to perform the work that they were elected to do. It also frees them, if they so choose, to engage in core First Amendment activities, such as delivering speeches and debating issues. As one study has pointed out, when spending is unlimited, "[a]ll too often, frontrunners will simply refuse to debate [their] opponent[s], preferring instead to raise campaign funds and buy commercials." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/ democracy/democracy.asp?id2=5977&id3= CFR&). With spending limits in place, "time freed from fund-raising creates new opportunities for speech – among representatives, for example, or by a candidate to ordinary citizens." Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1324 (May, 1994). Thus, spending limits not only free candidates from the time pressures of fundraising, but also provide further opportunity for political speech.

Expenditure limitations also reduce the threat to equal participation posed by millionaires and incumbents with access to vastly greater resources than the average citizen. By placing a ceiling on the amount that candidates can spend, expenditure limits make running for office less financially daunting for the average person and thereby promote electoral participation by encouraging more citizens to run. Voters benefit not only because they have

greater choice among candidates, but also because elected officials are forced to be more accountable to their needs, knowing that voters have a choice. The result is a more representative government.

Given the tremendous potential for expenditure limitations to control the influence of money on the electoral process, state and municipal legislators across the country are actively considering reform measures that include such limitations. *See, e.g.*, Massachusetts H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm) (proposing limits on campaign expenditures for all general, special, and primary elections for state office); North Carolina H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005) (available at http://www.ncga.state.nc.us/ Sessions/2005/ Bills/ House/HTML/H1533v0.html)(proposing mandatory expenditure limits on campaigns for the council of state and general assembly); Oregon H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess. (Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro. html) (proposing limits on a candidate's expenditure of his or her own funds in an election campaign).

Moreover, public support for campaign expenditure limits is extraordinarily high. A recent poll shows that a remarkable 87% of voters nationwide would support laws limiting campaign expenditures. Lake Research Partners, Public Opinion on Election Campaign Spending, p. 8 (Dec. 2005)(available at http://www.demos.org/pubs/Voter Survey_010406.pdf). Significantly, such support is extremely strong and consistent across all regions of the country (ranging from 84% support in the South to 91% in the Northeast), all political parties (84% support among Republicans, 89% support among Independents, and 90% support among Democrats), and all major demographic groups (84% support among men, 90% support among women, 88% support among those under age fifty, 86%

support among those over age fifty, 87% support among non-college graduates, 88% support among college graduates, 89% support among whites, 83% support among non-whites, 87% support among those with household incomes under $50,000, and 89% support among with household incomes over $50,000). *Id.* at pp. 9-11.

When asked about the effect that expenditure limits would have on the electoral process, 76% of those polled believed that the fairness of elections would improve, 70% stated that the potential for corruption and undue influence by special interests would decrease, 84% stated that elected officials would spend more time on their official duties and candidates would spend more time talking with voters, and 82% said that citizens would be more able to run for office. *Id.* at 12-15. Overall, 82% of voters felt that if laws incorporating expenditure limits were adopted, they would have more faith in the integrity of the election process. *Id.* at 15.

In sum, public interest in, and support for, expenditure limits is enormous nationwide. Given the great potential for such limitations to be invaluable tools in controlling the influence of money in electoral campaigns, the broad interest of States across the country in experimenting with such limits, and, as the respondents have shown, the lack of constitutional barriers, it is imperative that this Court uphold the constitutionality of Act 64 and open the door for similar legislation nationwide.

II. CONTRIBUTION LIMITS PLAY A KEY ROLE IN THE STATES' EFFORTS TO PROTECT THEIR ELECTORAL PROCESSES FROM CORRUPTION AND THE APPEARANCE OF CORRUPTION.

In fashioning Act 64, the Vermont legislature did not rely on expenditure limits alone. Instead, it concluded that limits on contributions to candidates from individuals, PACs, political parties, and any other single source were an

essential component of its comprehensive effort to address the myriad problems caused by unlimited campaign spending. 17 V.S.A. § 2805(a). The limits that Vermont adopted, which apply per election cycle, range from $200 on contributions to candidates for state representative or local office, to $400 on contributions to candidates for statewide office. *Id.* Citing this Court's well-established precedents, the Second Circuit appropriately upheld these limits, concluding that Vermont's interest in eliminating actual and apparent corruption was sufficiently important to support the limits and they were not so low as to prevent effective campaigning. *Landell*, 382 F.3d at 137-139.

The petitioners seek to reverse this ruling, arguing, among other claims, that Vermont failed to prove the existence of sufficient actual corruption or to demonstrate that its limits were no lower than necessary to address that corruption. Such arguments not only fly in the face of this Court's well-settled precedents governing contribution limits, but also, if adopted, would drastically curtail the States' ability to enact such limits and threaten existing limits with endless legal challenges. Given the critical importance of contribution limits to the States' efforts to prevent corruption and the appearance of corruption in the electoral process, such a result would be an enormous step backwards, effectively opening the door to even more corruption than currently exists.

A. Contribution Limits Are Valuable Tools In The States' Efforts To Battle Corruption And The Appearance Of Corruption.

Since *Buckley*, this Court has repeatedly and consistently upheld the constitutionality of contribution limits, recognizing that such limits involve "little direct restraint" on political communication because they permit "the symbolic expression of support evidenced by a contribution," but leave the contributor free to discuss

candidates and issues. *Buckley*, 424 U.S. at 20-21; *Nixon v. Shrink Missouri*, 528 U.S. 377, 386-387 (2000); *McConnell v. Federal Election Commission*, 540 U.S. 93, 135 (2003). Because such limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *Shrink Missouri*, 528 U.S. at 386, they need only be "closely drawn to match a sufficiently important interest." *Id.* at 387-388 (internal quotation marks omitted).

In so holding, this Court has recognized that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell*, 540 U.S. at 143. Significantly, and contrary to the petitioners' claim, this Court has "not limited that interest to the elimination of cash-for-votes exchanges" or "quid-pro-quo arrangements," *id.*, but rather has clearly extended it to "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *Id.* at 150, quoting *Colorado II*, 533 U.S. at 441.

This Court has also rejected the petitioners' contention that to justify contribution limits based on its interest in preventing corruption and the appearance of corruption, a government must produce significant evidence of actual corruption. Instead, this Court has ruled that the level of proof required to sustain legislative judgments will vary with the "novelty and plausibility of the justification raised," *Shrink Missouri*, 528 U.S. at 391, and has recognized that it is "neither novel nor implausible" that large contributions could corrupt or raise suspicions of corruption. *Id.*; *McConnell*, 540 U.S at 144.

Finally, this Court has made clear that a contribution limit is not unconstitutional merely because a higher limit might work equally well. *Buckley*, 424 U.S. at 30. As long as a contribution limit permits a candidate to "amas[s] the resources necessary for effective advocacy," *id.* at 21; *Shrink Missouri*, 528 U.S. at 397, "a court has no

scalpel to probe whether . . . a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30.

Based on these rulings, contribution limits have become a mainstay of state campaign finance reform efforts. Although such limits have proved incapable in themselves of solving the multiple, deep-seated problems discussed in Section I, *supra*, they nonetheless serve a vital role in the States' efforts to protect the integrity of the electoral process. In particular, States have found that contribution limits further their compelling interest in preventing the corruption and appearance of corruption that is inherent in a system of large contributions by inhibiting the ability of wealthy interests to exert improper influence over legislative and executive policies. In addition, by requiring candidates to raise smaller sums from a larger group of contributors, contribution limits force candidates to seek broader popular support than they would if contributions were unlimited, and prevent them from simply selling themselves to the highest, most potentially corrupting bidder. Indeed, the benefits of contributions limits are so well-accepted that 45 States currently impose them in one form or another. National Conference of State Legislatures, *Contribution Limits* (2005)(available at www.ncsl.org/ programs/legman/about/ContribLimits.htm).[4]

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[4] *See, e.g.*, Alaska Stat. § 15.13.070; Ariz. Rev. Stat. Ann. § 16-905; Ark. Code Ann. § 7-6-203; Cal. Gov. Code § 85301; Colo. Rev. Stat. § 1-45-103.7; Conn. Gen. Stat. § 9-333m; 15 Del. Code § 8010; Fla. Stat. § 106.08; Ga. Code § 21-5-41; Haw. Rev. Stat. § 11-204; Idaho Code § 67-6610A; Kan. Stat. Ann. § 25-4153; Ky. Rev. Stat. § 121.150; La. Rev. Stat. Ann. § 18:1505.2; Md. Ann. Code art. EL, § 13-226; Mass. Ann. Laws, ch. 55, § 7A; Me. Rev. Stat. Ann. tit. 21-A § 1015; Mich. Comp. Laws § 169.252; Minn. Stat. § 10A.27; Mo. Ann. Stat. § 130.032; Mont. Code Ann. § 13-37-216; Nev. Const. art. 2, § 10; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. § 19:44A-11.3; NY Elec. Law § 14-114; N.C. Gen. Stat. § 163-278.13; Ohio Rev. Code § 3517.102; Okla. Stat., tit. 74, Chap. 62, Appx., 257:10-1-2; R.I. Gen. Laws § 17-25-10.1; S.C. Code Ann. § 8-13-1314; S.D. Codified Laws § 12-25-1.1; Tenn. Code

B. The Evidentiary Requirements Advocated By The Petitioners, If Adopted By The Court, Would Render It Virtually Impossible – For States To Enact Contribution Limits And Cause Existing Limits To Become Mired In Legal Challenges.

In asking this Court to require States to produce evidence of actual corruption that is directly correlated with contributions just above the States' established limits, despite this Court's previous, express rejection of such a requirement, *Buckley*, 424 U.S. at 30, *Shrink Missouri*, 528 U.S at 391-392, 397, the petitioners seek to impose an impossible burden on the States that would threaten their continued ability to adopt contribution limits. As this Court recognized in *Buckley*, "the scope of [actual corruption] can never be reliably ascertained." *Buckley*, 424 U.S. at 27. Not only is it inherently difficult to prove the existence of corruption or to quantify its degree, but any requirement that the States meet the test advocated by the petitioners "would inevitably lead to endless court battles over the sufficiency of the 'evidence' marshaled by the State." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

Such a stringent evidentiary requirement would also force "a State's political system [to] sustain some level of damage before the legislature could take corrective action." *Munro*, 479 U.S. at 196. This approach would be senseless, given the widespread acknowledgment of the actual and perceived corruption associated with large contributions. Instead, as this Court held in *Munro*, a State should be permitted to respond to potential electoral deficiencies "with foresight rather than reactively," provided its

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Ann. § 2-10-302; Tex. Elec. Code § 253.155; Vt. Stat. Ann. tit. 17 § 2805; Wash. Rev. Code § 42.17.640; W. Va. Code § 3-8-12; Wis. Stat. § 11.26; Wyo. Stat. § 22-25-102.

response is reasonable and does not significantly impinge on constitutionally protected rights. *Id.* at 195-196. As a general rule, the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 195, 210 (1982). Nothing in the present case warrants imposing a different standard on Vermont.

C. Vermont's Contribution Limits Are Entitled To Deference And Are Not Significantly Different Than Other States' Limits That Have Been Upheld By The Courts.

The petitioners' further argument that Vermont's limits are unconstitutional because they would arguably be equally effective at higher levels is likewise unfounded. This Court explicitly rejected this argument in *Buckley*, 424 U.S. at 30, pointing out that it was not the prerogative of the courts to fine-tune the determinations of the legislature. Such deference is entirely appropriate.

In determining the dollar amounts that will be most effective at preventing corruption and the appearance of corruption, while still permitting candidates to amass the resources necessary for effective advocacy, each State must consider its own unique circumstances and needs. In States in which electoral districts cover small geographic areas or have few constituents, it may be possible for candidates to communicate with voters through relatively inexpensive means, such as by going door-to-door and distributing leaflets. In States where electoral districts are larger, television advertising and other, more expensive methods of communication may be required.

The wide variation among States in the costs of campaigning is borne out by figures compiled by The Institute on Money in State Politics documenting the average amounts raised by state legislative candidates in

the 2004 general elections. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). Whereas the average raised by state house candidates in California was $403,456, it was only $539 in New Hampshire. *Id.* Similarly, the average raised in state senate campaigns ranged from a high of $555,196 in California to a low of $3,747 in North Dakota. *Id.*[5] Myriad other factors, such as the income level of the State's inhabitants and their pattern of past contributions, may also factor into a State's determination of the most appropriate limits. In each case, the state legislature is far better positioned than the judiciary to weigh these factors and determine what dollar limit will best serve the State's needs.

Significantly, Vermont's contribution limits are not notably different from other States' limits that the courts have upheld. In *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004), the Ninth Circuit upheld a Montana statute limiting contributions to candidates for governor and lieutenant governor to $400, contributions to all other candidates for statewide office to $200, and contributions to candidates for any other public office to $100. Although the court acknowledged that these limits were "some of the lowest in the country," *id.* at 1095, it nonetheless concluded that they did not prevent Montana candidates from running effective campaigns.

Similarly, in *Daggett v. Commission on Government Ethic and Elections*, 205 F.3d 445 (1st Cir.

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[5] Significantly, the costs of campaigning in Vermont are very low compared to those of other States. The average amount raised by state house candidates in Vermont ($2883) was less than in all other States except New Hampshire and Wyoming, and the average amount raised by Vermont state senate candidates ($12,463) was lower than in all but three States, Montana, North Dakota and Wyoming. *Id.*

2000), the First Circuit upheld a Maine statute imposing per election limits of $500 on contributions to gubernatorial candidates and $250 on contributions to all other candidates. In *Minnesota Citizens Concerned v. Kelley*, 427 F.3d 1106 (8th Cir. 2005), the Eighth Circuit upheld Minnesota's $500 limit on contributions to legislative candidates and in *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256 (Mar. 20, 2000), the court upheld Florida's $500 limit on contributions to any state candidate.[6]

In short, Vermont's limits are not significantly different from those upheld in other States, including States such as Florida where the population is much greater than in Vermont[7] and the costs of campaigning are dramatically higher. *See* The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005)(noting that the average amount raised by Florida house candidates for the 2004 general election was $97,219, compared with $2,883 in Vermont). If this Court were to conclude, contrary to the Second Circuit's ruling, that Vermont's limits did not pass constitutional muster, the constitutionality of all of these other States' limits might be called into question. Because the petitioners have articulated no good reason to reach such a result, this Court should affirm the constitutionality of Vermont's limits and thereby ensure the continued ability of all States to utilize contribution limits in their on-going battle to protect the integrity of their electoral processes and restore the public's faith in democracy.

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[6] The contribution limits at issue in these cases – in Montana, Maine, Minnesota and Florida -- were per election, with the exception of Minnesota's limit, which was per election year. In non-election years, Minnesota's limit for contributions to legislative candidates drops to $100. Minn. Stat. § 10A.27.

[7] Florida's population exceeds 17 million, whereas Vermont's population is less than 700,000. U.S. Census Bureau, http://quickfacts.census.gov/qfd/index.htm.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

WILLIAM H. SORRELL, *et al.*,

Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF WILLIAM H. SORRELL, *et al.*

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of William Sorrell, *et al.*, Respondents/Cross Petitioners in these cases.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends increasingly coming to national attention. *Amici* do not necessarily support spending limits in any particular campaigns, but they believe that sovereign states should have the power to protect their elected judiciaries from the corrosive effects of uncontrolled spending by imposing generous limits on expenditures by candidates for the bench. *Amici* recognize that the instant case does not pertain directly to judicial campaigns, but a ruling that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), constitutes an absolute bar to mandatory spending limits will directly impair their interests in protecting the integrity, impartiality, and independence of the bench, both real and perceived. *Amici* therefore urge this Court not to accept that excessively expansive reading of *Buckley*, or, if that reading cannot be avoided, to revisit *Buckley*'s ruling in light of the arguments presented here.

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[1] We have been informed that the Attorney General of Vermont has filed a letter with the Clerk of this Court, consenting to the filing of all *amicus* briefs. Letters from counsel for all other parties, consenting specifically to the filing of this brief, have been filed with the Clerk of this Court by counsel for *Amici*. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] A complete list of the *Amici Curiae* is annexed as an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici acknowledge that several courts have read language in *Buckley* to outlaw all campaign expenditure ceilings. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 913-18 (6th Cir. 1998) (rejecting spending limits because interests advanced in their defense were rejected as constitutionally insufficient in *Buckley*). It is neither necessary nor appropriate, however, to read *Buckley* as an absolute ban on all mandatory limits on campaign spending. It is a mistake to read the language of any judicial opinion—including that of *Buckley*—as a theoretical pronouncement divorced from the fact pattern and statutory scheme that was actually before the Court.

Because the Federal Election Campaign Act ("FECA") at issue in *Buckley* imposed very low expenditure ceilings, and the *Buckley* Court evaluated only three state interests offered to justify those caps, this Court should not read *Buckley* to impose a *per se* ban on spending limits. Specifically, because FECA governs only federal candidates, *Buckley* did not present the issue whether expenditure caps applicable to judicial candidates might be justified by interests unique to the judiciary. This Court thus should not read *Buckley* to foreclose generous spending limits in campaigns for the bench. Point I.

If this Court concludes that *Buckley* categorically precludes all spending limits, then *Buckley* should be revisited. The decision in *Buckley* rests on the questionable premises that limits on spending invariably impose a severe burden on campaign speech and that contribution limits are adequate to combat real and perceived corruption. But above generous levels allowing for vigorous debate of the issues, the declining marginal utility of campaign spending means that each new dollar adds little new communicative value. Moreover, there is reason—including evidence from recent

judicial elections—to conclude that candidates are not eager to spend without limit but are instead trapped in a form of prisoner's dilemma that only generous spending limits can resolve. Without those limits, candidates must endlessly escalate the fundraising arms race, even if it means accepting contributions that taint their integrity and present opportunities for abuse. *Buckley* falls when these false premises are rejected. Point II(A)-(B).

Even if this Court does not reject *Buckley*'s tenuous assumptions, the opinion in these consolidated cases should be crafted with restraint. This Court should not permit its opinion to foreclose spending limits in judicial elections, which are not at issue in this case and the constitutionality of which has never been briefed to this Court. Whether such limits can be factually supported and legally justified is a question for another day. Point II(C).

ARGUMENT

I. *Buckley* Should Not Be Read To Ban Generous Spending Limits in Judicial Campaigns.

A judicial opinion is not a statute enacted to address broad and widely shared policy concerns. A court's opinion is a reasoned explanation for the resolution of a particular case or controversy. When explanatory language in an opinion appears to describe a rule far broader than necessary to resolve the particular case before the Court, the language is entitled to respect as the Court's considered *dictum*, but it is not controlling in different factual and legal settings. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) ("[B]road language" that is unnecessary to a decision "cannot be considered binding authority."); *Humphrey's Ex'r v. United States*, 295 U.S.

602, 627 (1935) ("[G]eneral expressions" in an opinion that "go beyond the case" may be respected "but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.") (internal quotations omitted).

Because the broad language of *Buckley* goes well beyond what was necessary to decide the challenge to expenditure limits in that case, the opinion should not be read as binding on the very different circumstances presented in the cases now before this Court or a case challenging spending caps in judicial elections. Given the very low spending limits imposed by FECA, and the limited arguments in their defense asserted by the government, the federal expenditure caps could not withstand First Amendment scrutiny. But the ruling in *Buckley* does not foreclose the constitutionality of more generous spending limits supported by stronger justifications.[3]

A. *Buckley* Addressed Only the Very Low Spending Limits Imposed by FECA.

This Court first drew a bright-line distinction between campaign contributions and expenditures when it considered the constitutionality of the FECA 30 years ago in *Buckley*. The *Buckley* Court upheld FECA's caps on contributions to candidates, concluding that limiting large contributions

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[3] There will be no bright-line test whereby to judge whether spending limits are sufficiently generous to withstand First Amendment scrutiny any more than there is such a test to judge whether contribution limits are too low. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). But as with contribution limits, courts will be able to parse the facts and context of particular expenditure ceilings and, without second-guessing the line-drawing of the legislature, recognize differences in kind between spending limits that afford ample opportunity for all candidates to engage in vigorous discussion of their positions and those that do not. *See Buckley*, 424 U.S. at 30; *see also Nixon*, 528 U.S. at 395.

would combat both the appearance and reality of corruption without materially burdening a contributor's First Amendment rights. 424 U.S. at 20-38. The Court equated expenditures with political speech, however, and found that "the Act's expenditure ceilings impose[d] direct and substantial restraints" on First Amendment rights. *Id.* at 19-20, 39. It then ruled that three proffered state interests—in diminishing "the danger of candidate dependence on large contributions," "equalizing the financial resources of candidates competing for federal office," and "reducing the allegedly skyrocketing costs of political campaigns,"—could not justify imposing those restraints. *Id.* at 55-57. The very low limits in FECA invited such an analysis.

FECA imposed tight limits on independent expenditures, self-funding by individual candidates, and on spending by candidates' campaign committees.[4] No person could spend more than $1,000 annually advocating the election or defeat of any one federal candidate, *id.* at 40; presidential and vice-presidential candidates could spend no more than $50,000 of their own money, *id.* at 51; and varying limits were set for spending by congressional and presidential candidate committees, *id.* at 51, 54, 55. The Court commented that the independent expenditure limitation "would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper." *Id.* at 40. In addition, the campaign spending ceilings would have "substantially limited the overall expenditures of the two major-party Presidential candidates in 1972." *Id.* at 55 n. 62. The low levels of the limits plainly, and rightly, fueled

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[4] FECA's limits on expenditures by political parties were challenged only as Fifth Amendment violations and were upheld in *Buckley*. 424 U.S. at 59 n. 67. This Court later held that limits on independent expenditures by political parties violated the First Amendment. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616-618 (1996).

the Court's conclusion that First Amendment rights were severely burdened by FECA.[5] As is explained in Point II, however, generous expenditure limits need not impose such onerous burdens and thus should not be precluded by the decision in *Buckley*.

B. *Buckley* Did Not Consider the Full Range of State Interests That Could Be Proffered To Justify Generous Expenditure Caps.

The *Buckley* Court considered, and rejected, three governmental interests offered in defense of FECA's low spending limits. Although that reasoning may well warrant reconsideration, this Court need not now revisit that aspect of the decision to uphold generous spending limits. Experience since *Buckley* demonstrates that there are additional compelling state interests that may justify such limits.

What *Buckley* inadvertently wrought by upholding contribution limits and invalidating expenditure ceilings is a campaign finance system with limited supply and unlimited demand for money.[6] Candidates fearful of being outspent must chase every potential donation, even if it means—and it does mean—being locked up in a room for long hours every

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[5] *Amici* have no quarrel with the narrow holding of *Buckley* striking down the expenditure limits actually before that Court as undue interferences with political speech. It is because *Amici* believe that the size and contextual justification for a given set of spending limits are relevant to the First Amendment analysis that *Amici* oppose a mechanical reading of *Buckley* as a *per se* bar on expenditure limits, no matter what the circumstances.

[6] The solution to this problem cannot be a return to the unregulated campaign finance system with its attendant corruption, real and perceived, which precipitated the enactment of FECA in the first place. Rather, this Court should recognize that the very interests that support contribution limits, and other interests not considered in *Buckley*, warrant limits on the demand for cash as well as the supply.

day dialing for dollars. Sitting officials running for re-election are diverted from governmental responsibilities, and all candidates must divert their attention from the broad array of voters who crave communication with aspiring officeholders to the narrow range of well-heeled donors who can pay for such access. Fundraising pressures inescapable in the absence of expenditure caps thus have a direct adverse impact on the functioning of government, as both courts below recognized. *Landell v. Sorrell*, 382 F.3d 91, 123 (2d Cir. 2004); *id.*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). Moreover, the reality and appearance of corruption that arise when candidate time is disproportionately devoted to courting monied interests, *see* Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* 61-80 (1999) (describing what happens when the "culture of money" dominates politics); Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 16-23, 27-35, 61-68, 89-109 (1995) (providing examples from former officeholders of how fundraising compromised legislative decisions); contribute to the "eroding of public confidence in the electoral process." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

Expenditure limits thus serve two compelling interests not considered as potential justifications in *Buckley*. First, the ceilings ensure that public officials running for office will need less time to raise campaign funds and have more time to fulfill their duties of office, improving the quality of democratic representation. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282-83 (1994). Second, during the time that is spent on campaigning, candidates can reach out to constituents without the means to become contributors as well as to those who will provide financial support, encouraging more robust dialogue, broadening the scope of the policy debate, and building confidence in the

political process. Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1619 (1999) ("Fund-raising becomes such a preoccupation that it drives out competing uses of time, like thinking about issues, developing positions, and conferring with constituents even if they do not have a great deal of money.").

Finally, *Buckley* considered the constitutionality of limits imposed in FECA, which applied only to spending in federal elections. Because federal judges are not elected, the Court was never asked to consider—and this Court has never considered—whether there might be compelling governmental interests not implicated in races for executive or legislative office that could justify spending limits in campaigns for the state bench. Because Vermont does not elect its judges, that question is not presented in this case either. The distinct function of the judiciary—both federal and state, whether appointed or elected—and the unquestionable importance of preserving real and perceived judicial integrity, impartiality, and independence, thus argue for a reading of *Buckley* that does not preclude the possibility of proving compelling interests that justify expenditure ceilings in judicial elections. *See* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 135 (1998) ("*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence.").

II. *Buckley* Should Be Reconsidered If It Imposes a Ban on Mandatory Spending Limits That Reaches Not Only Executive and Legislative Races But Also Campaigns for the Bench.

If this Court reads *Buckley* as adopting an absolute ban on mandatory expenditure limits, the Court should revisit the decision in light of the factual evidence and legal arguments supporting Vermont's spending ceilings. *Cf. Agostini v. Felton*, 521 U.S. 203, 235-38 (1997). Whatever the strength of the Court's reasoning under the facts stipulated in *Buckley*, the circumstances of this case are distinguishable on at least two important grounds. First, the lower courts in this case found that effective campaigns could be conducted under Vermont's spending limits. Second, nearly 30 years of experience under *Buckley* has revealed that contribution limits alone cannot adequately combat the decline in public confidence caused by real and apparent governmental corruption. In other words, the principal assumptions on which the opinion rests do not hold true for generous spending limits that allow for meaningful campaigns.

A generous campaign spending cap is distinguishable from an unreasonably low spending limit in ways that are constitutionally significant with respect to the burden on both the candidate's First Amendment interest and the compelling nature of the government's interest in combating corruption. Given the extremely low spending limits at issue in *Buckley*, the Court correctly concluded that "the expenditure limitations contained in [FECA] represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19. But the generalized premise that restrictions on campaign expenditures are the equivalent of a direct ban on political speech simply does not hold when one considers the decreasing marginal effectiveness of campaign spending at generous levels. Moreover, the Court's assumptions that

campaign expenditures above a generous ceiling are unrelated to corruption and represent wholly voluntary speech are undermined by recognizing that campaign spending is often a prisoner's dilemma in which candidates feel compelled to engage in a destructive and potentially corrupting fundraising arms race. In judicial elections, especially, there is reason to believe that record-breaking expenditures are less a reflection of candidates' preferred method of conducting campaigns than of their inability (caused by the unnecessarily broad reading of *Buckley*) effectively to coordinate their decisions about spending in the absence of legally binding limits.

A. The Link Between Money and Speech Weakens as Campaign Expenditures Rise Above a Generous Level.

In striking down campaign spending limits, the *Buckley* Court's analysis rested in part on the assumption that a campaign's expenditure of money and its political speech are so closely related that an effort to regulate campaign spending is the virtual equivalent of an effort to regulate the speech directly. The Court assumed that the relationship between spending and speech is always identical, no matter how much money is involved: "A restriction on the amount of money a person or group can spend on political communication during a campaign *necessarily* reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (emphasis added).

In fact, the relationship between money and speech in political campaigns is not constant. Candidates spend money in order to persuade the electorate to go to the polls and vote

for them on election day.[7] To achieve that goal, candidates in contested elections must advertise themselves to the voters. Advertising, however, is subject to the law of diminishing returns—"the more of it is done, the less effective each unit becomes." Ross D. Petty, *The Impact of Advertising Law on Business and Public Policy* 38 (1992) (discussing commercial advertising); *see also* Robert W. McAuliffe, *Advertising, Competition, and Public Policy* 26 (1987) ("Most research has shown that there are *diminishing* returns to [commercial] advertising.") (emphasis in original). Although other factors also influence the marginal effectiveness of each additional dollar a candidate spends—for example, the candidate's name recognition,[8] whether the candidate is an incumbent,[9] and the amount of money her opponent has spent[10]—over a threshold level, the marginal effectiveness of additional campaign expenditures declines. *See* King Banaian & William A. Luksetich, *Campaign Spending in Congressional Elections*, 29 ECON. INQUIRY 92, 93 (1991) (noting that "additional [campaign] expenditures are not likely to be as effective as previous expenditures") (citing Gary Jacobson & Samuel Kernell, *Strategy and Choice in Congressional Elections* (1982)); Kevin B. Grier,

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[7] To the extent that a candidate's speech is a manifestation of her autonomy and self-expression, a campaign spending limit does not affect this interest. A campaign spending cap leaves a candidate free to speak her mind.

[8] *See, e.g.*, Kevin B. Grier, *Campaign Spending and Senate Elections, 1978-84*, 63 PUB. CHOICE 201, 210-11 (1989) (candidate spending to buy name recognition has a relatively larger effect at low expenditure levels as compared with the spending of a candidate that is already well known).

[9] *See id.* at 209 ("[A]t lower spending levels, challenger spending is more effective than equal amounts of incumbent spending, while incumbent spending is productive longer than is challenger spending.").

[10] *See, e.g.*, Keith T. Poole et al., *The Revealed Preferences of Political Action Committees*, 77 AM. ECON. REV. 298, 298-99 (1987) ("At the margin, a dollar of spending is more 'productive' in a close race than in one that is not highly competitive.").

Campaign Spending and Senate Elections, 1978-84, 63 PUB. CHOICE 201, 216 (1989) (stating that, while the relative productivity of campaign spending by challengers and incumbents varies with respect to the level of expenditures, "both types of spending have diminishing returns"). Thus, contrary to the *Buckley* Court's unqualified equation of campaign expenditures with political speech, the qualitative nature of the First Amendment interest of the candidate and the electorate marginally diminishes with each additional expenditure over a generous ceiling for both incumbents and challengers.[11]

In arguing that a generous spending cap would have less impact on First Amendment rights than would a low expenditure ceiling, *Amici* do not suggest that the impact is *de minimis*. Campaign expenditures above a generous spending cap would enable candidates to issue more campaign advertisements, just as allowing contributors to give more than $2,000 to a candidate for federal office would enable a contributor to communicate more strongly the intensity of her support for a candidate. The point is instead that just as the First Amendment value of money contributed to candidates decreases over a threshold amount, *see Buckley*, 424 U.S. at 20, the First Amendment value of money spent by candidates decreases at the high end of a diminishing

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[11] It is sometimes argued that spending ceilings have a greater impact on challengers than incumbents, largely because challengers must spend more to overcome the incumbency advantage of high name recognition. *See, e.g.*, Gary Jacobson, *The Effects of Campaign Spending on Congressional Elections*, 72 AM. POL. SCI. REV. 469, 470 (1978). Although this claim is hotly contested in the political science literature, *see, e.g.*, Donald Green & Jonathan Krasno, *Rebuttal to Jacobson's "New Evidence for Old Arguments,"* 34 AM. J. OF POL. SCI. 363, 369-72 (1990) (arguing that other factors, such as challenger quality, determine spending patterns and votes received), the argument is not directly pertinent in this case, as the spending ceilings in Vermont are generous and are not likely to stifle challenger spending.

marginal impact curve. As that value declines, so should the burden imposed on a state seeking to justify spending limits.

B. Spiraling Expenditures May Reflect a Prisoner's Dilemma, Rather Than Fully Voluntary Spending in Need of Protection.

The *Buckley* Court's decision to invalidate FECA's campaign expenditure limits rested on two key premises. The Court assumed that: (1) candidates were each free to choose whether to raise and spend increasingly large sums on their election campaigns, and (2) the level of expenditures was unconnected to the threat of corruption. *See* 424 U.S. at 57 ("[C]andidates . . . must retain control over the quantity and range of debate on public issues in a political campaign."); *id.* at 55-56 (campaign spending limits do not address the threat of corruption stemming from candidate dependence on large contributions). When applied to elections with high levels of campaign spending, however, neither assumption is justified.

Candidates functioning in an unregulated campaign expenditure setting are trapped in a prisoner's dilemma. In the classic account of the prisoner's dilemma, two prisoners are arrested and held separately with no means of communication. If neither cooperates with the prosecutor, both will be convicted of a lesser offense and sentenced to two years' imprisonment; if only one agrees to testify against the other, that one will go free and the other prisoner will receive the maximum sentence of ten years' imprisonment; and if both cooperate, each will be prosecuted for the more serious crime but receive a six-year sentence instead of the maximum penalty. The prisoner's dilemma produces independent decisions by both prisoners to cooperate with the prosecutor, leaving them worse off than if they had been able to coordinate their decisions and agree to keep silent. Each prisoner would reason that he will be better off confessing

whether his codefendant stays silent (in which case he will receive no prison time instead of two years) or also confesses (in which case he will receive six years in prison instead of ten). *See* Douglas G. Baird et al., *Game Theory and the Law* 33-34 (1994); William Poundstone, *Prisoner's Dilemma* 116-25 (1992); Russell Hardin, *Collective Action* 2-3 (1982).

In the candidate's version of the prisoner's dilemma, each candidate must continue to raise and spend funds, not because he or she would freely choose to do so, but because the candidate fears that an opponent will do so, and thereby gain an advantage. "Each [politician] would prefer expenditures to be limited, but if they are not limited, each must struggle to raise and spend as much as possible." Ronald Dworkin, *Free Speech and the Dimensions of Democracy, in If* Buckley *Fell: A First Amendment Blueprint for Regulating Money in Politics* 63, 83 (E. Joshua Rosenkranz, ed. 1999). The resulting uncontrollable spiral intensifies candidates' dependence on contributions, rendering them vulnerable to the appearance and reality of corruption. The effect of the candidate's dilemma is that candidates and society are both worse off than if a generous spending ceiling had been in effect.

Except for the very wealthy, or in a system of full public funding of elections, all candidates must raise money to run for office. An unending round of fundraising is not always in the best interests of candidates. It is inordinately time-consuming, it is personally demeaning, it deflects them from the substantive business of governance and campaigning, and it exposes them to the reality and appearance of corruption. Moreover, because campaign spending follows the law of diminishing returns, at extremely high levels, it is unlikely to change the outcome of the election at all, especially when matched by an opponent. For these reasons, a rational candidate would seek to engage in no more fundraising than is necessary to make a persuasive case to the electorate.

Acting alone, however, no candidate can set a reasonable campaign spending (and therefore fundraising) limit. Campaign spending is not a static event. *See generally* Steven Ansolabehere & Shanto Iyengar, *Winning Through Advertising: It's All in the Context, in Campaigns and Elections American Style* 101, 108-11 (James A. Thurber & Candice J. Nelson eds., 1995) (noting that the impact of one candidate's advertising is contingent on the opponent's advertising; political advertisers are interdependent rather than autonomous actors). Although the law of diminishing returns applies to campaign expenditures, each candidate knows that winners usually outspend losers. *See, e.g.*, Poole, *supra* note 9, at 298; Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1175 (1994).

Accordingly, to set a reasonable budget, each candidate needs to know how much money his opponent will spend on the race. In an unregulated campaign expenditure world, however, a candidate will never know the outer range of his opponent's budget. A rational candidate therefore will engage in limitless fundraising and spending, reasoning that she is better off doing so no matter what her opponents does: she avoids the danger that she will be outspent and suffer because outspending correlates with winning, and given this correlation she may gain advantage by outspending her opponent. The result of this candidate's dilemma is a fundraising spiral in which, after a threshold level, each side engages in fundraising primarily out of fear that the other side will gain an advantage. *See* Neuborne, *Is Money Different?*, 77 TEX. L. REV. at 1617.

Moreover, as campaign spending spirals to higher and higher levels, candidates become more vulnerable to corruption. Because *Buckley* considered candidate

dependence on "large contributions" as the sole source of the actuality and appearance of political corruption, 424 U.S. at 55, the Court failed to consider that spiraling campaign costs are also corrupting because they increase a candidate's dependence on contributions *generally*. In the post-*Buckley* world, candidates are desperate to maximize expenditures, but limited in the amount of contributions they can raise from any one donor.[12] Hence, candidates must sell themselves to greater numbers of donors for smaller amounts of money. In such an atmosphere of intense need, both candidates and contributors are intensely vulnerable to an inappropriate temptation to trade badly needed cash for badly needed political favors. In contrast, under a spending cap, contributors become more fungible. If one contributor expects something in return for his contribution, the candidate can move to another who will not make such demands, without significant risk of strategic loss.

The involuntary and mutually destructive nature of the candidate's dilemma is well documented by the 2004 Supreme Court election in Illinois. The election set a national fundraising record for a single state Supreme Court seat—with the two candidates raising more than $9.3 million. Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—and How to Keep Our Courts Fair and Impartial* 14, 18 (Justice at Stake 2005). But even the victorious candidate expressed dismay at a campaign finance system that produced an endless money chase. Calling the expenditures "obscene," winner Lloyd Karmeier asked: "What does it gain people? How can people

[12] Candidates are desperate to maximize expenditures even in states without contribution limits, as the recent Supreme Court elections in Illinois (described *infra*) demonstrate. There, the potential for corruption created by the endless demand is exacerbated by the opportunities for corruption presented by large contributions.

have faith in the system?" Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004. Plainly, the new justice did not believe that he or his opponent needed to spend many millions of dollars to deliver their messages to the electorate, but the system left neither of them with any other choice.[13]

Without that choice, Karmeier accepted large sums directly and indirectly from a party with a case pending before the Illinois Supreme Court while the election proceeded. Kevin McDermott, *Donations to Judge Figure in Court Cases*, St. Louis Post-Dispatch (Feb. 1, 2005). Once elected, he refused to recuse himself from the case. *See* Kevin McDermott, *Court Says Karmeier Can Hear Donor's Case*, St. Louis Post-Dispatch (Mar. 16, 2005). He then cast the deciding vote on a $456 million claim, overturning a lower court decision that was unfavorable to his donor. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005); G.M. Filisko, *Billion-Dollar Verdict Goes Bust: Illinois Supreme Court Reverses Record Verdict Against State Farm*, ABA Journal e-Report (Aug. 26, 2005), *at* http://www.abanet.org/journal/ereport/au26verdict.html.

Even assuming that the decision was based on an unbiased consideration of the facts and the law, public confidence in the judge's integrity has been tarnished. *See, e.g.*, Lyle Denniston, *A Constitutional Duty to Recuse?*, *at* http://scotusblog.com/movabletype/archives/2005/12/25 week/ ("Should an elected judge, who accepts large

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[13] Contributors to Karmeier also recognized the structural problem. "This is a system that has just gotten out of control," said Ed Murnane of the Illinois Civil Justice League, an association of doctors, insurers, and business groups, which was a major donor to Karmeier's campaign. Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004 (noting that Murnane "agreed with Karmeier and others that limits on spending in judicial races or other ways to elect or appoint judges should be considered").

campaign donations, sit on a case that directly affects the financial or business interests of the donors and their associates? Put as an ethical question, the answer would seem to be obvious: No."); *Justice for Sale*, *at* http://www.acrsnetwork.com/acrs/html/justice_for_sale.html (noting that post-decision interviews revealed "overall lack of faith in the judicial system, the uniform belief that justice had been sold to the entity capable of paying the most"). In a system with expenditure limits, the candidates would not face the untenable choice between rejecting contributions that compromise their perceived impartiality and losing the advantage that comes with tainted cash.

The harms caused by the candidate's dilemma can be dealt with only by collective action that promises each side that the other will not gain a competitive advantage—in other words, by adhering to a generous spending cap imposed by law. Under such a cap, neither side will be driven to raise funds out of fear of the other's excesses.

Voluntary spending limits cannot achieve this goal. The transaction costs of trying to reach an agreement on spending are too high in races involving more than two candidates, and the strategic reasons that cause candidates to engage in the fundraising race to begin with will dissuade any candidate from agreeing to limit spending if she believes she is the better fundraiser. Even if candidates were able to agree to spending limits, the distrust between them and the temptation

to outspend each other will make such agreements highly unstable.[14]

In Ohio, the state Supreme Court's effort to end the candidate's dilemma by limiting expenditures was defeated by the overly broad reading of *Buckley* recommended by Petitioners in the instant case. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1999). The *Suster* court concluded that "the language of *Buckley* and its progeny have necessarily determined, irrespective of the *kind* of position sought, that any spending restriction in any *electoral* campaign process is an infringement on a candidate's First Amendment rights." *Id.* at 530 (emphasis in original). Claiming that *Buckley* recognized only one compelling state interest, the *Suster* court refused even to consider others that might justify spending limits in judicial campaigns. *Id.* at 532 ("Although Defendants cite several other interests, the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence."). When the limits were invalidated, several candidates nevertheless made serious efforts to control their spending, producing average expenditures in the general election of approximately $800,000. Institute on Money in State Politics, State at a Glance: Ohio 2000, Judicial Elections, http://www.followthemoney.org/database/StateGlance/state_judicial_elections.phtml?si=200035. But fundraising pressures were overwhelming as soon as the next cycle, and average general election spending nearly doubled to $1.56 million in 2002.

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[14] That voluntary spending limits cannot by themselves resolve the candidate's dilemma is evident in the record below, where the District Court noted that adherence to the voluntary limits Vermont adopted in 1993 "plummeted" with "each election cycle," until no candidates agreed to participate in 1998. *Landell*, 118 F. Supp. at 465; *see also* Frank Phillips, *Kerry Spent $1.7m on Election*, Boston Globe, Dec. 6, 1996 (noting the breakdown of an agreement to limit use of personal funds following Senator Kerry's allegation that Governor Weld had violated their spending agreement for the 1996 senatorial race).

Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2002: How the Threat to Fair and Impartial Courts Spread to More States in 2002,* 19 (Justice at Stake 2004).[15] *Amici* reflect the concerns of many judges who would welcome a solution to the candidate's dilemma.

C. This Court Should Not Reach Out to Preclude States from Combating the Harms Associated with Uncontrolled Judicial Campaign Spending.

Amici have argued that if *Buckley* is read to impose a per se ban on spending limits, its key assumptions should be reexamined in this case. Because the interest in completely unfettered campaign spending decreases as expenditures cross very high thresholds, the burden of spending limits set at generous levels is not severe. Indeed, spending limits ample enough to ensure robust debate may more appropriately be regarded not as a burden, but as relief from unwelcome and relentless pressure to raise endless amounts of campaign cash. Finally, *Amici* have challenged *Buckley*'s assumption that contribution limits are adequate to guard against real and perceived corruption by describing the corrupting potential of the uncontrolled demand for every possible lawful donation. *Supra*, at 16.

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[15] The record-breaking spending in Illinois might be attributed in part to the absence of contribution limits in that state. But Ohio, which imposed $2,200 limits on contributions to 2002 candidates for the Supreme Court, Edward D. Feigenbaum & James A. Palmer, *Campaign Finance Law 2002* OH-3 (FEC), *available at* http://www.fec.gov/pubrec/cfl/cfl02/cfl02part2bsummaries.doc, saw four million-dollar campaigns in that year. Contribution limits are not designed to control spending, and they often do not do so in practice. *See* Kedron Bardwell, *Campaign Finance Laws and the Competition for Spending in Gubernatorial Elections*, 84 SOC. SCI. Q. 811 (Dec. 2003). Only the coordination mechanism supplied by expenditure caps can end the candidate's dilemma in judicial elections.

Even if this Court rejects *Amici*'s critique of *Buckley*, restraint should be exercised to ensure that the opinion in this case does not unnecessarily reach beyond the circumstances presented here. The state's interest in protecting the real and perceived integrity of candidates who are desperate for campaign cash under any system that does not limit spending does not vary depending on whether they are running for executive, legislative, or judicial office. But there are functions unique to the judiciary—its role as impartial arbiter of disputes and as an independent check on majoritarian excesses—that states have strong interests in defending and that should not be foreclosed by an unnecessarily broad decision in this case.

Whether the interests in actual and apparent judicial impartiality and independence are sufficiently compelling to justify mandatory spending limits in campaigns for the bench should await a case that squarely presents that question. To the extent that *Buckley* is read to reach that question, even though it was not presented on the facts of that case, this Court should overrule *Buckley*. States should be free to demonstrate that interests uniquely implicated by judicial campaign finance are sufficiently important to justify limits on spending in campaigns for the bench.

That option should remain open even though the harms associated with uncontrolled candidate spending could be eliminated by ending judicial elections altogether. After all, even appointment systems are not immune from the influence of money and politics—witness the battle waged on the air and the web over the three most recent U.S. Supreme Court nominations. *See, e.g., Advice, Consent, and Advertising: Television Advertising on Nominations to the U.S. Supreme Court, at* http://www.brennancenter.org/programs/scnominations/robertsnomination.html; *Withdraw Harriet Miers, at* http://withdrawharrietmiers.blogspot.com/. States originally adopted judicial elections as a means of protecting the

judiciary from the ills of patronage and partisan politics, Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860,* 45 HISTORIAN 337 (1983), and they have introduced a variety of structural changes to the electoral process in response to developments that threatened unduly to politicize the judiciary, *see* L. Berkson, *Judicial Selection in the United States, in Guide to Political Campaigns in America* 398 (P. Herrnson, ed.2005) (describing rise of nonpartisan elections); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (describing "Missouri Plan," which couples appointment with retention elections). States should now be free directly to address the most recent threat—the rising importance of money in judicial elections—through changes in their campaign finance systems, including spending limits. Precluding states from adopting such changes will not necessarily ensure the abandonment of judicial elections, but it will certainly hasten the decline of the real and perceived integrity, impartiality, and independence of the judiciary. Because Vermont's law is not applicable to judges, this Court can and should decide this case without foreclosing spending limits in judicial elections.

CONCLUSION

Amici take no position on the constitutionality of the specific spending limits at issue in these consolidated cases. For the reasons stated above, however, *Amici* respectfully request that the Court affirm the decision below as to its holding that mandatory spending limits are not unconstitutional *per se*. If the lower court's holding is rejected as to spending limits in executive and legislative races, *Amici* urge the Court to craft its decision not to foreclose the imposition of spending limits in judicial elections.

Respectfully submitted,

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APPENDIX

APPENDIX

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Former Chief Justices of state high courts:

- Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994)
- Hon. Richard P. Guy (Washington Supreme Court, 1999-2001)
- Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995)
- Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992)
- Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001)

Former and current Associate Justices and Associate Judges of state high courts:

- Hon. Andy Douglas (Ohio Supreme Court, 1985-2002)
- Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996)
- Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993)
- Hon. Howard A. Levine (New York Court of Appeals, 1993-2002)
- Hon. Alice Resnick (Ohio Supreme Court, 1989-present),
- Hon. Cruz Reynoso (California Supreme Court, 1982-1987)

Former and current Justices and Judges of intermediate appellate and trial courts:

- Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002)
- Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977)

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Nos. 04-1528
(Consolidated with Nos. 04-1530 and 04-1592)

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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---

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICUS* [1]

The Democratic National Committee ("DNC") is an unincorporated association that is the governing body of the Democratic Party of the United States and is the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971 as amended. 2

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

U.S.C. § 431(14). The DNC actively supports Democratic candidates in federal, state and local elections throughout the nation and is subject to federal and state campaign finance laws including, in the case of Vermont, Vermont's Act 64. The current national chair of the DNC is Howard Dean, M.D., who served as Governor of Vermont from 1991 to 2003 and, as the State's Governor, signed Act 64 into law in 1997.

Pursuant to Sup. Ct. R. 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. *Buckley v. Valeo*, 424 U.S. 1 (1976) did not foreclose the possibility that campaign expenditure limits could survive the "exacting scrutiny" test, if the government could show that such limits serve compelling governmental interests, not considered in *Buckley*, and are narrowly tailored to serve those interests.

2. Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and candidate expenditures. The candidate expenditure limits serve two fundamental and related compelling interests, neither of which was foreclosed by *Buckley*: (i) restoring integrity and faith in the democratic process in Vermont by effectively reducing the significance of private donations as a means of achieving access to and influence over elected officeholders; and (ii) promoting and enhancing access to and participation in the political process by all citizens, regardless of financial means, both as individuals and in association with each other by, *inter alia*, *enhancing* the role of political parties.

3. The second of these interests has an especially significant dimension with respect to the role of political parties. The role of parties has declined since *Buckley* as individual candidates have become entrepreneurs, able to raise and spend unlimited sums of money, making them increasingly

less dependent on party committees. As a result, the historical beneficial role of parties in achieving accountability, consensus and more effective government, has been diminished. Act 64 enhances the role of political parties by leaving them free to expend funds to support the party's message generally and to spend independently in support of their candidates. By restoring this historical balance, parties are in a better position to perform their critical functions of unifying factions in the electorate, enhancing the voice of all citizens in the political process and connecting citizens to their government. Restoring the role of parties in this way is itself a particularly compelling governmental interest.

4. The Court has afforded legislative bodies deference when they make decisions protecting the political process. Such deference is especially warranted in this case. By contrast with the campaign finance regime, for example, considered in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), in enacting Act 64 elected officials have not restricted the spending of *other* participants in the political process, but rather have decided to restrict their *own* spending in order to enhance participation in and access to the political process by their constituents, thereby restoring the faith of ordinary citizens in their democracy. Nor have incumbent legislators used the law to try to protect themselves against challengers. Act 64 likely enhances the ability of challengers because candidates' own spending is reduced significantly; the expenditure limits are actually set higher for challengers; and challengers' supporters, including in particular political parties, have the right to spend unlimited sums independently to promote those challengers.

I. BUCKLEY DOES NOT FORECLOSE CANDIDATE EXPENDITURE LIMITATIONS THAT ARE PART OF AN INTEGRATED SCHEME NARROWLY TAILORED TO SERVE COMPELLING GOVERNMENTAL INTERESTS

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that "although . . . contribution and expenditure limitations both implicate fundamental First Amendment interests, . . . expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.* at 23. Therefore, the Court ruled, the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The Court proceeded to hold that the limitation imposed on candidate expenditures by the 1974 Amendments to the Federal Election Campaign Act of 1971, 18 U.S.C. § 608(c)(1974), was unconstitutional. *Buckley*, 424 U.S. at 54-58.

The lower court in this case correctly concluded, however, that "Buckley does not permanently foreclose any consideration of campaign expenditure limitations." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). In *Buckley*, the Government asserted, and the Court considered, only three interests: (1) "alleviating the corrupting influence of large contributions;" 424 U.S. at 55; (2) "equalizing the financial resources of candidates competing for federal office," *id.* at 56; and (3) "reducing the allegedly skyrocketing costs of political campaigns . . . ." *Id.* at 57. The Court did not suggest that no government interest that could ever be asserted in a future case could ever be sufficiently compelling to meet the "exacting scrutiny" or "strict scrutiny" test. To the contrary, the Court simply concluded that, "*No governmental interest that has been suggested* is sufficient to justify the restriction on

the quantity of political expression imposed by [the] campaign expenditure limitations." *Id.* at 55 (emphasis added).

The "exacting scrutiny" test prescribed by *Buckley*, for evaluating the constitutionality of expenditure limitations, requires that the government "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 504 U.S. 191, 198 (1992), *quoting Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To be sure, it is difficult to meet that standard, but it is not impossible. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), *quoting Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)(Marshall, J., concurring). Thus, the Court of Appeals correctly held that "Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest." *Landell, supra*, 382 F.3d at 110.

II. ACT 64'S EXPENDITURE LIMITS SERVE COMPELLING GOVERNMENTAL INTERESTS

Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and expenditures by candidates. The Act limits candidate expenditures in any given two-year election cycle to $ 300,000 for governor; $ 100,000 for lieutenant governor; $ 45,000 for secretary of state, attorney general, treasurer, and auditor; $ 4,000 for state senator, plus $ 2,500 for each additional seat in the relevant jurisdiction; $2,000 for state representative in a single-member district; and $ 3,000 for state representative in two-member districts. Vt. Stat. Ann. Tit. 17 § 2805a(a)(2005). These limits are adjusted for inflation every two years. *Id.* at 2805a(e). In the court below, the State of Vermont asserted that at least five interests are served by the candidate expenditure limits: "(1) 'avoiding the reality and appearance of cor-

ruption . . .'; (2) 'assuring that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties;'" (3) promoting 'electoral competition and protecting equal access to political participation;' (4) 'bolstering voter interest and engagement in elective politics;' and (5) 'enhancing the quality of political debate and voters' understanding of the issues.'" *Landell*, 382 F.3d at 115. Although the Court of Appeals analyzed only the first two of these (anti-corruption and time-saving), the third and fourth interests—protecting access to political participation and bolstering voter interest—are fundamental to our democracy and are broader and more compelling than the Court of Appeals may have assumed.

A. Restoring Citizen Confidence in the Democratic System Is a Compelling State Interest

It is no surprise that, in reacting to the current lobbying and influence-peddling scandal in Washington, D.C., most voters believe that "there is widespread corruption in Washington" (58% "widespread" vs. 38% "limited", ABC News/Washington Post poll, Jan. 5-8, 2006) and that "most elected officials in Washington make policy decisions or take actions as a direct result of money they receive from major campaign contributors." (65% yes/21% no, FOX News/Opinion Dynamics, Jan. 10-11, 2006). Voters have expressed the view, in the past, that there should be a "fixed amount of money for election campaigns" and that "all private contributions from other sources should be prohibited." (65% good idea/27% poor idea, Gallup Poll, Oct. 1996).

Similarly, in enacting Act 64, the Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." Act 64, Finding (a)(4). The District Court in this case found that the trial record "overwhelmingly demonstrated that the Vermont public is suspicious about the effect

of big-money influence over politics and that voter apathy is on the rise." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). The District Court pointed to, among other things, polling finding that 74% of Vermont voters "feel that ordinary voters do not have enough influence over politics and government in Vermont." *Id.* at 469. And the District Court held that "[s]pending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*," including "'[p]reserving faith in our democracy,'" *id.* at 482-83, *quoting Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). The District Court concluded that, "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* at 483.

The Court of Appeals characterized this state interest as "avoiding corruption and the appearance thereof . . . ." *Landell*, 382 F.3d at 115, an interest which the Court in *Buckley* held did not, by itself, justify imposition of candidate expenditure limits. *Buckley*, 424 U.S. at 55. The *Buckley* Court found that the "interest in alleviating the corrupting influence of large contributions is served by the [law]'s contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Id.* Notwithstanding the Court of Appeals' characterization of Vermont's interest as being "anti-corruption" and "safeguarding its political process from such contributor dominance," *Landell*, 382 F.3d at 118-19, the real interest at stake here is *not* only in preventing the reality or appearance of "corruption"—that is, of undue influence of contributors purchased through the making of large contributions. Another, related but separate interest is in combating the perception that the need to raise and spend large amounts of private contributions—no matter how limited each individual contribution may be—naturally and inherently distorts the democratic process by forcing elected

officials to focus their time, attention, energy and priorities on those who can afford to make political contributions, at the expense of everyone else whose interests those elected officials are also supposed to be representing.

While this situation may not meet the traditional definition of "corruption," it has resulted in a loss of faith in the fairness of the electoral and political processes. This loss of faith is demonstrated by the kind of survey research considered by the District Court in this case and by lowered voter turnout and participation in the political process generally. As the Court of Appeals stated, the issue is the impact of "contributor dominance" on "the process for achieving accessibility and accountability of state officials and candidates. . . . The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system." *Id.* at 118-19. The achievement of such accessibility and accountability—and of public confidence that they exist—is a goal directly related to but different in nature than the aim of "alleviating the corrupting influence of large contributions" considered in *Buckley*, 424 U.S. at 55. It is difficult to imagine, however, a more compelling interest than restoring public faith in our democratic system.

B. Enhancing the Relative Role of Political Parties Is a Compelling State Interest

In enacting Act 64, the Vermont Legislature found that "limiting campaign expenditures will . . . encourage the personal involvement of a large number of citizens in campaigns, . . . crucial to public confidence and the robust debate of issues." Act 64, Finding (a)(8), *quoted in Landell*, 118 F. Supp.2d at 468. An important aspect of this governmental interest, not explored either by the District Court or the Court of Appeals, is "protecting equal access to political participation" and "bolstering voter interest and engagement,"

Landell, 382 F.3d at 115, in the sense that, by limiting what candidates themselves can spend, candidate expenditure limits make expenditures by groups of ordinary citizens *more* significant and thus amplify the voices of the citizenry to which the candidates are supposed to be responsive. Such limits actually promote and enhance access to participation in the political process by ordinary citizens, acting both individually and in association with each other.

In particular, Act 64 enhances the role and power of political parties. To be sure, Act 64 treats political party committees like other contributors with respect to their ability to make monetary or in-kind contributions *to* candidates: a political party cannot contribute to a candidate, or make an expenditure coordinated with a candidate, of more than $200 for state representative, $300 for state senator or county office and $400 for statewide office. Vt. Stat. Ann. Tit. 17, §§ 2805(a)-(b). A political party expenditure that is coordinated with a candidate is deemed to be a "related campaign expenditure," which is treated in the same way as a contribution. *Id.* §§ 2809(c) & (d). However, under the Act, while *candidates* are limited in what they can spend, political parties are *not* so limited. To the contrary, parties can make two categories of unlimited expenditures that can significantly promote their platforms and help elect their candidates.

First, under Act 64, party committees can freely undertake spending to promote the party, its views and platform and its candidates generally, including voter registration, voter turnout efforts and generic communications promoting the party and its positions ("Vote Democrat") without referencing specific candidates. The Vermont Secretary of State has authoritatively interpreted the Act to mean that an expenditure by a political party that substantially benefits more than six candidates "and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure,"

Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses," § 3. The result of this interpretation is that such party expenditures are *not* treated as contributions, and are therefore unlimited.

Second, under Act 64 political parties are free to make unlimited independent expenditures on behalf of specific candidates. A party expenditure is treated as a "related campaign expenditure," and thus as a contribution subject to the Act's limits, only if it is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. Tit. 17 § 2809(c). If a party expenditure does not meet this definition, it is deemed to be independent, and *not* subject to any limit.[2]

Strengthening the role of parties, as Act 64 does, is in itself a compelling governmental interest. First, it has been widely recognized that strong political parties serve a vital role in our democracy, in particular, in giving voice to ordinary citizens in the political process and combating the undue influence of special interests. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic*

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[2] While section 2809(d) of the Act creates a rebuttable presumption that a party expenditure that "primarily benefits six or fewer candidates who are associated with the political party. . . is presumed to be a related expenditure," and thus subject to the contribution limits, that presumption has been interpreted by the Secretary of State to be rebuttable—that is, a party committee may establish that its expenditure was independent by presenting "evidence that the elements of the definition" of "related campaign expenditure" were not met. Administrative Rule 2000-1, § 3(d). In any event, the presumption provision in itself is not critical to achievement of Act 64's important purposes and, if necessary, is severable from the rest of the Act. Vt. Stat. Ann. Tit. 1 § 215; *see Landell*, 118 F. Supp. 2d at 492-93.

Party v. Jones, 530 U.S. 567, 574 (2000). "[P]olitical parties are the voluntary associations principally committed to making democracy work." Nancy L. Rosenblum, *Symposium: Law and Political Parties: Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000).

Because political parties "are bodies large enough to translate the people's will into action, they bridge the gap between the electors and the government, ensuring that the people have a voice." Clarisa Long, *Note: Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1175 (1994). As one commentator has noted:

> Parties perform at least four critical functions for American democracy. They promote a competitive electoral environment ("competitiveness"); they aggregate interest groups and minorities into electoral and policymaking coalitions ("representation"); they coordinate between officials in each branch and level of government ("governance"); and they sometimes behave like other types of political organizations that exist mainly to express members' policy positions and beliefs ("expression").

Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793 (2001). "Parties are a force of unification in the divided American policy system . . . .[T]hey bring people of diverse political views together; by providing a structure to bring divergent social and ideological groups together, parties limit the destructive impact of factionalism." Amanda G. Altman, *Note: Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v Colorado Republican Federal Campaign Committee*, 46 ST. LOUIS L.J. 1001, 1030 (2002).

Second, these functions have been undermined since *Buckley* as candidates have increasingly become individual entrepreneurs, able to raise and spend unlimited sums in their

own right, and less dependent on the parties. "[T]oday, even partisan candidates build and operate organizations largely independent of the state and national parties . . . . Candidates raise their own money. They hire their own contractors . . . ." Rosenblum, *supra*, 100 COLUM. L. REV. at 814. "Those candidates who reach Congress are more independent of party selection, support and discipline today than at any previous time in our history. . . .They now owe loyalty not to a party with a reasonably coherent view of the right mix of national policy, but to a variety of narrowly focused pressure groups with disparate and conflicting views." Lloyd Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 34 (1985). These "declines in party government and party loyalty . . . are of enormous current importance . . . .[T]they go far to explain the national disappointment in the effectiveness of Congress and of the national government . . . ." *Id.* at 27.

Act 64 thus helps restore the ability of party committees, at least in Vermont, to serve the critical functions of unification, giving voice to the views of voters and achieving better governance. Enhancing and restoring the role of political parties in this way should be regarded as an especially compelling governmental interest.

C. Deference Should Be Accorded to the Decision of Vermont Legislators to Limit Their Own Spending Relative to That of Other Political Actors

While *Buckley* counseled against restricting "the speech of some elements of our society in order to enhance the relative voice of others," *Buckley*, 424 U.S. at 48-49, "those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ." *Nixon v. Shrink Missouri*

Government PAC, 528 U.S. 377, 402 (2000)(Breyer, J., concurring).

More critically, the *Buckley* language should, as a logical matter, be given far less weight when, as in this case, lawmakers are restricting their *own* campaign spending, rather than that of others. The Court has afforded deference generally to the determinations of legislators about the need for laws that regulate campaign finance, underscoring the need to "show[] proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 137 (2003). "[S]uch deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity . . . ." *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003).

In *McConnell*, for example, the Court upheld virtually all of the provisions of the Bipartisan Campaign Act of 2002 ("BCRA") even though that law sharply reduced the resources available to national and state political party committees, 2 U.S.C. § 441i, and outlawed much broadcast advertising criticizing Members of Congress, 2 U.S.C. §§ 434(f)(3), 441b(b)(2), while *increasing* the limits on contributions to the very Members of Congress who enacted the law. 2 U.S.C. § 441a(a). "We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . ." *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting).

If BCRA did not impermissibly "restrict the speech of some elements of our society in order to enhance the voice of others," *Buckley*, 424 U.S. at 48-49, then surely Act 64 does not. Far from restricting the voice of critics while enhancing their own, the Vermont legislators who enacted Act 64 did the opposite: they restricted *their own* spending, while enhancing the significance of the spending of *other* political

actors. Special deference should therefore be accorded to their judgments about the compelling need to impose such restrictions in the form of the candidate expenditure limitations.

In this regard, it is not true that Act 64's "limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents." *Landell*, 382 F.3d at 178 (Winter, J., dissenting). To be sure, as Judge Winter noted, "When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents." *Id.* at 158. Such motive and opportunity are not evident in this case, however.

First, the limits on candidate spending here are set at such affordable levels that there is little doubt that any serious challenger would be able to match the incumbent's spending—a situation that is an improvement over the typical circumstances faced by challengers. The trial record in this case included evidence that spending limits reduce the disparity between challenger and incumbent spending, and thus actually advantage *challengers*. *Landell*, 382 F.3d at 128. Second, unlike any other federal or state campaign finance law ever passed to our knowledge, Act 64 actually sets spending limits lower for incumbents than for challengers: incumbent candidates for statewide office can spend only 85% of the limit for challengers and incumbent candidates for the legislature can only spend 90%. Vt. Stat. Ann. Tit. 17 § 2805a(c). Finally, as discussed in section II(B), *supra*, the party committees are not limited in their spending on behalf of challengers, either through voter mobilization activities or through independent spending on behalf of specific challengers.

For these reasons, particular deference should be accorded to the judgment of the Vermont legislators who enacted Act 64, about the compelling need to impose candidate expenditure limitations.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

—v.—

WILLIAM H. SORRELL, et al.,

Respondents.

(Caption continued on inside cover)

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF, AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al.

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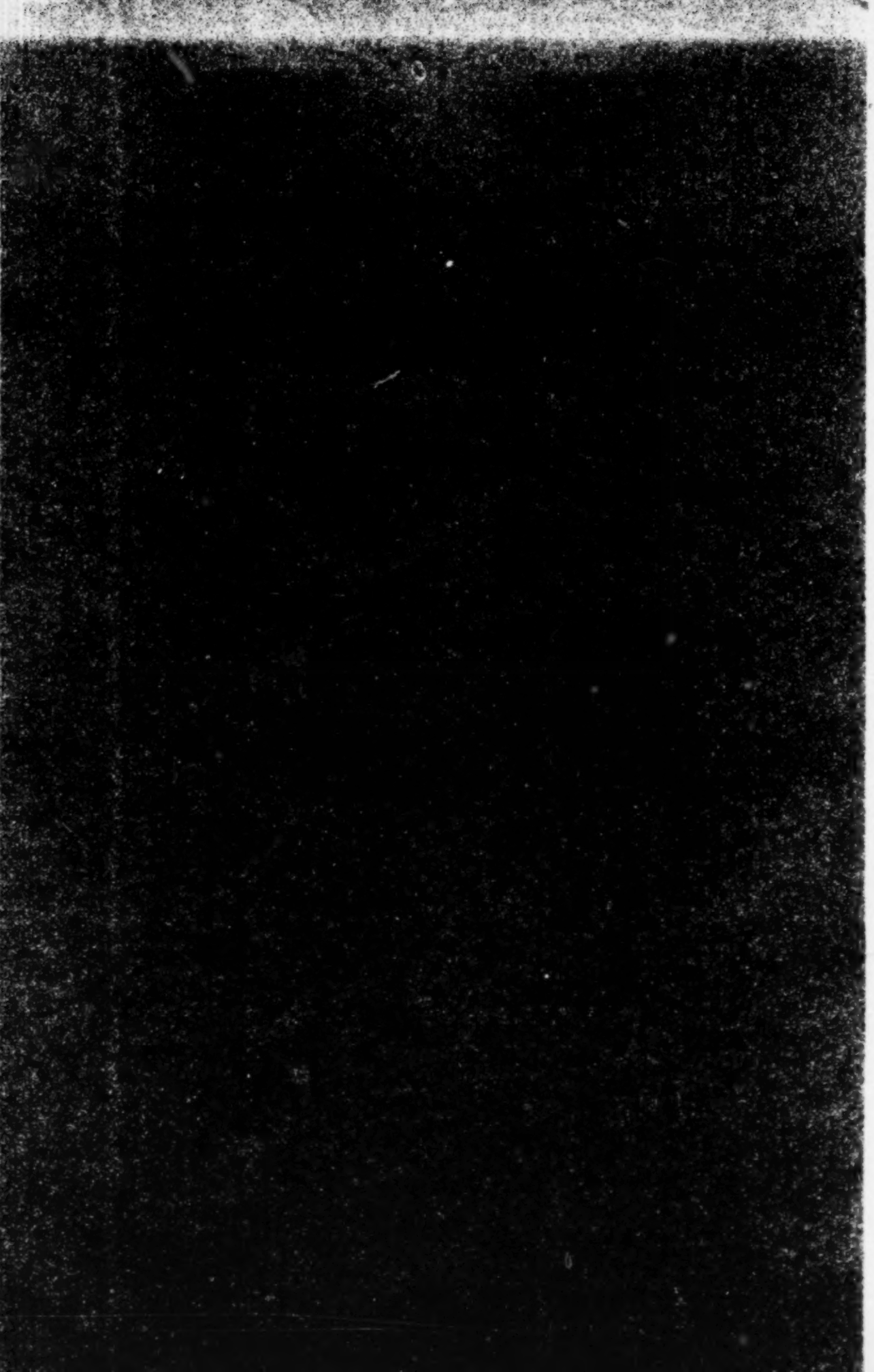

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I

INTEREST OF AMICI

Amici are former senior officials of the American Civil Liberties Union (ACLU).[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. Burt Neuborne served as Legal Director of the ACLU from 1981-1986. He is currently Inez Millholland Professor of Civil Liberties at New York University School of Law. John Shattuck served as Director of the ACLU's Washington office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Helen Hershkoff served as an Associate Legal Director of the ACLU from 1987-1995. She is currently Professor of Law at New York University School of Law and co-director of the Arthur Garfield Hays Civil Liberties Program. Charles S. Sims served as an Associate Legal Director of the ACLU from 1983-1986. He is currently a partner in the firm of Proskauer Rose LLP.

While a*mici* continue to support the ACLU's matchless efforts in defense of the First Amendment, we oppose the contention in this case that ceilings on campaign expenditures are categorically unconstitutional. *Amici* believe that generous campaign expenditure ceilings free candidates, voters, campaign contributors and the general public from hydraulic pressures unleashed by a limitless demand for

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[1] All parties have consented to the filing of this brief. Written copies of their consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, other than assistance by New York University School of Law in the brief's production and filing.

campaign funds that impede the development of substantive issues, breed corruption, and decrease the quality of electoral debate. Because *amici* believe that important First Amendment values exist on *both* sides of the regulatory equation in this case, we respectfully submit this brief *amici curiae* urging the Court to permit legislatures to enact generous ceilings on campaign expenditures.

SUMMARY OF ARGUMENT:

THE CURRENT LEGAL AND FACTUAL CONTEXT

As Chief Judge Walker noted below, most lower courts read *Buckley v. Valeo*, 424 U.S. 1 (1976), as requiring the invalidation of all government-imposed ceilings on campaign expenditures by candidates,[2] no matter how generous the ceiling. *Landell v. Sorrell*, 406 F.3d 159, 170 (2d Cir. 2005) (Walker, C.J., dissenting from the denial of rehearing *en banc*). *See Homans v. City of Albuquerque*, 366 F.3d 900, 914 (10th Cir.) (invalidating spending ceiling), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir. 1998) (same); *see also Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312 (9th Cir. 1992).

Indeed, in the thirty years since *Buckley*, although the precise question of a candidate-expenditure limit has not reached the Court, this Court has not sustained a government effort to limit campaign expenditures outside the narrow context of corporate spending. *Compare FEC v. NCPAC*, 470 U.S. 480 (1985) (invalidating limit on uncoordinated independent expenditures); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on use of paid petition signature gatherers); *Colorado Repub. Fed'l Campaign Comm v. FEC*, 518 U.S. 604 (1996) (invalidating ban on independent expenditures by political party prior to the selection of its

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[2] This case does not involve the related but analytically distinct issue of efforts to limit independent campaign expenditures by third-persons.

candidate) *with Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate campaign spending).[3]

Conversely, in the years since *Buckley*, this Court has repeatedly sustained government efforts to limit the size, source and timing of campaign contributions. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (sustaining contribution limits to PACS); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (sustaining state contribution limits); *FEC v. Beaumont*, 539 U.S. 146 (2003) (sustaining corporate contribution limits); *McConnell v. FEC*, 540 U.S. 93 (2003) (sustaining comprehensive regulation of contributions).[4]

The differential judicial treatment of campaign contributions and expenditures flows directly from *Buckley*'s analytic framework. As Justice Stevens explained in *McConnell*, the *Buckley* Court viewed campaign expenditures as a form of direct speech by candidates. *McConnell*, 540 U.S. at 120-21.[5] As such, campaign expenditures may be regulated only if necessary to advance a compelling government interest. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying classic First Amendment weighted balancing test to uphold bans on electioneering within 100 feet of the polls).

Buckley held that the Federal Election Campaign Act's spending ceilings failed to advance a compelling governmental interest. The *Buckley* Court ruled, first, that the government's undoubted interest in equalizing political

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[3] *See FEC v. MCFL*, 479 U.S. 238 (1986) (recognizing "grassroots" exception to *Austin*).

[4] Coordinated expenditures have been treated as contributions. *See FEC v. Colorado Repub. Fed'l Campaign Comm.*, 533 U.S. 431 (2001).

[5] Justice Stevens has consistently questioned the equivalence between speech and money inherent in the *Buckley* analysis. *See Shrink Missouri*, 528 U.S. at 398 (Stevens, J., concurring).

power based on wealth did not empower it to limit the speech of the wealthy in order to enhance the relative political power of the less wealthy. *Buckley*, 424 U.S. at 48-49, 56-57.[6]

Second, because the *Buckley* Court did not perceive a link between expenditures and corruption, *id.* at 45-47, 55-56, the Court rejected avoidance of corruption as a justification for placing a ceiling on campaign expenditures. Accordingly, the Court did not consider whether a demonstrated link between unlimited campaign spending and an increased risk of corruption would justify a prophylactic limit on expenditures.

Third, the *Buckley* Court rejected the notion that a compelling government interest existed in reducing "wasteful, excessive or unwise" campaign spending for its own sake. *Id* at 57. Once again, the *Buckley* Court did not consider whether a showing that runaway campaign spending was adversely affecting the nature and quality of the democratic process would justify a spending ceiling. Rather, the *Buckley* Court viewed the asserted interest in reducing spending as resting solely on paternalism, and rejected it on that basis.

Unlike campaign expenditures, Justice Stevens noted in *McConnell*, the *Buckley* Court viewed campaign contributions as a form of indirect speech posing a risk of corruption. *McConnell*, 540 U.S. at 134-38. As such, the regulation of campaign contributions is subject to a less rigorous form of scrutiny, demanding only that the contribution limit be "closely drawn to match a sufficiently important interest." *Id.* at 136 (quoting *Beaumont*, 539 U.S.

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[6] The *Buckley* Court acknowledged the legitimacy of a government interest in minimizing political disparities based on wealth, but noted that strengthening the economically weak speaker was the constitutionally preferred option. *Id.* at 48-49. *See Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284-86 (S.D.N.Y.) (upholding expenditure ceiling as *quid pro quo* for voluntary campaign subsidy), *aff'd mem.*, 445 U.S. 995 (1980).

at 162). Because *Buckley* recognized a link between contributions and corruption, contribution limits are valid as long as the legislature's fear of corruption is plausible, and the contribution ceiling permits a candidate to amass sufficient resources to engage in effective advocacy. *See Shrink Missouri*, 528 U.S. at 395-96.

While the *Buckley* Court's bright-line distinction between campaign expenditures and campaign contributions has been the subject of criticism, *see Shrink Missouri*, 528 U.S. at 405-10 (Kennedy, J., dissenting); *id.* at 410-20 (Thomas, J., dissenting), it has become an entrenched principle of the law of campaign finance regulation. *McConnell v. FEC*, 540 U.S. 93 (2003). The net result is a judicially-imposed campaign-finance regulatory regime that limits the supply of campaign funds, but places the demand for campaign cash beyond government regulation. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 (criticizing the existing regulatory model).

As with any regulatory regime that limits supply but not demand, the current funding of American democracy exhibits serious dysfunction.

First, the inability to place generous ceilings on campaign expenditures places candidates in a classic prisoner's dilemma, trapping many candidates in an electoral version of the nuclear arms spiral,[7] in which rival candidates are forced to raise and spend additional campaign funds (even though neither wishes to do so) because of a rational fear that unilateral financial disarmament will enable an opponent to gain a competitive advantage. *See generally* Garrett Hardin, *The Tragedy of the Commons*, Science, pp. 1243-48 (Dec.13, 1968); Thomas C. Schelling, *The Strategy of Conflict* (1980

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[7] See Phillip Schrodt, *Richardson's Arms Race Model*, National Collegiate Software Clearinghouse, Raleigh, North Carolina (1987) (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

ed.); Robert Axelrod, *The Evolution of Cooperation* (1984); William Poundstone, *Prisoner's Dilemma* (1993); James D. Miller, *Game Theory at Work* (2003).[8]

Second, rational competitive behavior triggered by a prisoner's dilemma, creates an unending search, and a desperate need, for campaign funds, empowering self-interested contributors to exact *quid pro quos* – and worse from candidates who must obtain the contributions to keep pace with an opponent. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Speech Limits May Not Violate the First Amendment*, 94 Colum. L. Rev. 1281, 1284-89 (1994); *see also* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L. J. 147, 174 (2004); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1710-11, 1736 (1999).

Third, the hydraulic fundraising pressure generated by an uncontrollable demand for campaign cash tempts incumbents to place inappropriate pressure on potential contributors,[9] and encourages both candidates and contributors to seek an unending parade of loopholes – or worse - placing the regulatory system under perennial siege. *See Colorado Repub.* 533 U.S. at 457 ("[S]ubstantial

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[8] For an application of prisoner's dilemma game theory to the area of campaign financing, see Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem* (Available at http://law.bepress.com/cgi/viewcontent.cgi?article=2317&context=expresso) (last visited February 8, 2006).

[9] One need look no further than the current headlines to see examples of the fundraising frenzy unleashed by a limitless demand for campaign funds. *See* Anne E. Kornblut, *Lobbyist Accepts Plea Deal and Becomes Star Witness in a Wider Corruption Case*, N.Y. Times, Jan. 4, 2006, at A1; Philip Shenon, *Top Aide to DeLay Pleads Guilty to Conspiracy*, N.Y. Times, Nov. 22, 2005, at A21; Philip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. Times, Sept. 29, 2005, at A1.

evidence demonstrates how candidates, donors, and parties test the current limit of the law and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced. . . .").

Fourth, independently wealthy candidates are granted an enormous artificial advantage because they may expend unlimited campaign sums without the inconvenience of raising the funds through an expensive and time-consuming regulated process, enabling them to distort political processes without regard to public support. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1271-73 (1993).[10]

Finally, the impossibility of capping campaign expenditures acts as an invitation to dramatically out-spend a financially weaker opponent, leading to many elections in which one candidate so dominates the debate because of massively superior resources that an opponent is literally drowned out.[11]

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[10] Recent elections in New York and New Jersey exemplify the trend to candidates of great personal wealth. *See* David Chen, *Bloomberg Cruises to Re-election Victory; Corzine is Winner in Costly New Jersey Race*, N.Y. Times, Nov. 9, 2005, at A1.

[11] Two disturbing sets of statistics describe the movement toward overwhelming financial advantage in congressional races. In the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, while median spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. The recent figures are drawn from *The Almanac of American Politics* and the c-span.org web site, and are helpfully summarized in Allan I. Abramowitz, et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75-88 (Feb. 2006) (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

In short, the existing regime of constitutionally-mandated unlimited campaign expenditures exacts a terrible toll on American democracy, adversely affecting the First Amendment interests of candidates, contributors, voters and the public. While some candidates have a First Amendment interest in expending unlimited sums in seeking to overwhelm an opponent, most candidates and voters have important competing First Amendment interests that are jeopardized by unlimited campaign spending. These include an opponent's First Amendment interest in being heard over the din of a candidate with massively superior financing; a voter's First Amendment interest in hearing both sides of a political issue before voting; a citizen's First Amendment interest in a government that does not appear to be bought and paid for; and, most importantly, the First Amendment interests of the vast bulk of candidates who wish, at some point, to stop raising funds and to concentrate on substance, but who are unable to do so because they are trapped in a classic arms race spiral, driven by a fear that unilateral financial disarmament may be lethal.

Amici believe that the presence of important First Amendment interests on both sides of this case should translate into greater deference to legislative judgments that as long as a spending ceiling is sufficiently generous to permit effective and robust advocacy, the First Amendment benefits of capping campaign expenditures outweigh the First Amendment interests of candidates wishing to engage in unlimited spending. *See Shrink Missouri*, 528 U.S. at 399 (Breyer, J., concurring).

Accordingly, *amici* urge the Court to accept Justice Kennedy's challenge in *Shrink Missouri* to reconsider dicta in *Buckley* in a manner that permits states to enact comprehensive regulation of both campaign contributions and expenditures in order to free candidates from an endless spiral of fundraising and to permit them to focus their

energies on the substance of their campaigns. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting).

ARGUMENT

I. Generous Expenditure Ceilings Are Constitutional Because They: (A) Free Candidates From an Endless Spiral of Fundraising; (B) Counteract the Risk of Corruption Generated By Such an Endless Fundraising Spiral; and (C) Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

A. Introduction: The Available Options

Multiple approaches exist to the issue of campaign funding. One possible approach is to abandon the effort to regulate the campaign funding process altogether, leaving candidates and contributors free to raise and spend campaign funds without restriction as to size or source. Of course, even if no limits existed on campaign contributions, the persistence of an unlimited demand for campaign cash would continue to trap candidates in a prisoners' dilemma, with each candidate forced to raise unlimited amounts from self-interested donors. While a legislature could, of course, opt for such complete deregulation, the settled course of this Court's campaign finance jurisprudence upholding the regulation of campaign contributions because of the risk of corruption makes that choice clearly one for the people. Accordingly, any insistence that the First Amendment disables American democracy from defending itself against corruption and cynicism by forcing it to endure a constitutionally-imposed regime of unrestricted campaign contributions is untenable. *See McConnell*, 540 U.S. at 153 ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their

constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

Second, one could believe that public funding of elections is the best way to finance democracy. Twenty-first century government funds many activities that were once the province of private enterprise – building roads, policing the community, maintaining a Navy, providing education, operating mass transit, printing election ballots, administering elections. Adding the funding of the electoral campaign to that list is an obvious possibility.[12] Once again, however, the choice between government and private funding of the electoral process is one for the people to make. *Harris v. McCrae*, 448 U.S. 297, 313-18 (1980).

Third, one could regulate both campaign expenditures and contributions in a coordinated effort to assure generous campaign funding and robust political advocacy, without suffering the dysfunctions attributable to a completely deregulated process, or to a regime of unrestricted spending by candidates and contributors. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting); *id.* at 399, 405 (Breyer, J., concurring).

The one approach that *amici* believe cannot be defended would be to continue the current practice of regulating the supply of campaign funds in an effort to limit corruption, while insulating demand for campaign funds from any and all efforts at regulation. The resulting imbalance between restricted supply and unlimited demand breeds corruption, impedes the development of substantive ideas, and contributes to the elimination of competitive elections.

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[12] For a survey of current public financing provisions, see John M. De Figueiredo and Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. 591, 627-640, 651 (2005).

Accordingly, while *amici* believe that *Buckley* was correctly decided on its facts because the expenditure ceilings before the Court in that case were constitutionally inadequate, the dicta in *Buckley* that has been read as invalidating any effort to limit campaign expenditures no matter how generous the ceiling, and no matter how compelling the interest in restriction, should be reconsidered in light of more than thirty years of experience.[13] Generous candidate expenditure limits that permit candidates to expend "the resources necessary for effective advocacy" *Shrink Missouri*, 528 U.S. at 396 (quoting *Buckley*, 424 U.S. at 21), do not violate the First Amendment.

B. Generous Expenditure Ceilings Advance the Autonomy of Candidates by Freeing Them From Becoming Trapped in an Endless Spiral of Reciprocal "Defensive" Fundraising

Buckley employed classic First Amendment methodology. Since the *Buckley* Court determined that the relationship between campaign spending and campaign speech is so close that regulation of one is the functional equivalent of regulating the other, the Court applied a weighted balancing test derived from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to measure the constitutionality of spending ceilings. Under the *Brandenburg* test, an expenditure limit must be narrowly tailored to advance a

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[13] Such a reconsideration would not require the Court to overrule its holding in *Buckley* for two reasons. First, *Buckley*'s dicta is not entitled to any *stare decisis* effect. *See United States v. Gaudin*, 515 U.S. 506, 522 (1995); *United States v. Dixon*, 509 U.S. 688, 714 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). Second, the *Buckley* Court never considered the consequences of a prisoner's dilemma on unlimited campaign spending. See *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005) (upholding statute against First Amendment challenge on basis of government speech theory neither raised nor considered in prior cases invalidating similar statutes).

compelling state interest in order satisfy the First Amendment.

The government asserted three potential compelling interests in support of the candidate expenditure limit in *Buckley* – the avoidance of corruption, the advancement of political equality, and the desire to reduce the cost of campaigning. The *Buckley* Court rejected the equality interest, ruling that the First Amendment does not permit an effort to equalize speech by silencing the strong speaker. *Buckley*, 424 U.S. at 56-57. The Court rejected the anti-corruption justification, as well, reasoning that an expenditure did not involve a payment from a third-person, and was, therefore, not susceptible to corruption. *Id* at 55-56. Third, the Court rejected a general interest in lowering the cost of campaigning as a paternalistic effort to deem all spending above the limit "wasteful, excessive, or unwise." *Id.* at 57.

In the more than 30 years since *Buckley*, nothing has occurred to cast doubt on the Court's perception that the spending ceilings imposed by Congress in 1974 were too low to permit robust and effective advocacy, especially by candidates challenging incumbents, and their supporters. Individuals could only expend $1,000 on any particular candidate's campaign – approximately one-seventh of the cost of a one-page newspaper advertisement. *Id.* at 19 n.20. As the Court rightly recognized, this would foreclose virtually all individuals "from any use of the most effective modes of communication." *Id.* at 19. Although the candidate and party spending caps were somewhat more generous, they would have forced many candidates to curtail the scope of their campaigns. *Id.* at 19 n.21. Taken together, FECA's restrictions left little room for the kind of robust advocacy at the heart of the First Amendment.

But much has occurred casting doubt on the Court's dictum that expenditure ceilings do not advance a compelling state

interest. *Buckley* simply never considered what the past 30 years has abundantly demonstrated - absent expenditure limits, candidates, trapped in a prisoner's dilemma, must devote excessive time and energy to raising campaign funds, rendering themselves vulnerable to corruption, and unable to engage in the serious and time-consuming substantive work required of a candidate for public office.

The heart of the *Buckley* analysis was a decision to protect the autonomy of candidates. The Court reasoned that the right of a candidate to make an autonomous decision about how much money to spend is core political activity protected by the First Amendment. In support of its decision, the *Buckley* Court employed a now-familiar metaphor, analogizing money to gasoline, and campaigning to a drive in the country. *Id.* at 19, n.18.

According to the metaphor, a car/campaign is able to progress only as far as gasoline/money is available to power it. But the metaphor is deeply flawed. A political campaign is not a unilateral drive in the country, with the driver making autonomous decisions about how far he or she wishes to drive. Rather, it is a winner-take-all competition between at least two drivers, with the decision of each driver/candidate about how much gasoline/money to expend affecting and being affected by the spending of rivals. In the absence of spending ceilings binding on each candidate, rational rivals will continue to raise and spend campaign cash long after each has raised and spent sufficient funds to carry out effective and robust advocacy, not because each candidate wishes to continue the "gyre" of fundraising, but in order to guard against being outspent by a rival. Blasi, *supra*, at 1284-89, 1309; Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: Constiutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004). Thus, far from protecting candidate autonomy, *Buckley*'s scheme actually circumscribes it.

As with any prisoner's dilemma, in the absence of collective action, formal autonomy is overwhelmed by inexorable pressure to anticipate and react to actions by rivals. Under such circumstances, genuine autonomy is possible only if both participants are constrained by collective action. *See supra* at 5-6 & nn. 7-8.

As this Court noted in *Buckley*, an intimate link exists between money and speech, placing rival candidates in a position similar to rival powers in a nuclear arms race. During the Cold War, once each side had amassed an arsenal capable of destroying the other, neither side had an interest in continuing to expend scarce resources on enormously expensive new weapons systems. But in the absence of a collective action solution, neither power could trust the other to refrain from the deployment of new weapons that might permit the other to gain a material, potentially lethal, advantage. The result was a series of reciprocal "involuntary" investments in nuclear arms that diverted scarce resources from other uses, harming the economy and social structure of both powers – eventually causing the Soviet Union to implode, and the United States to defer badly needed repairs to its infrastructure and its social fabric. *See* Schrodt, *Richardson's Arms Race Model*, *supra* (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

In fact, while the Soviet Union and the United States were formally autonomous during the nuclear arms race, indeed, each occupied the summit of power, each was a hostage to the real or perceived actions of its rival. Formal autonomy existed; but it was the false autonomy of the prisoner's dilemma. *See* Schelling, *supra*, at Appendix A "Nuclear Weapons and Limited War."

Competitive political candidates in a regime of constitutionally-mandated limitless campaign spending exhibit the same prisoner's dilemma. In the absence of

collective action in the form of a generous spending ceiling, even after each candidate has amassed resources sufficient to engage in effective and robust advocacy, neither dares to stop raising money because of a fear that the rival will gain a competitive financial advantage. The net result is the massive and never-ending diversion of candidates' time and energy from substantive tasks, such as the development of programs and discussion of issues, to an involuntary spiral of fundraising and related tasks. *See* Blasi, *supra*, at 1285 ("No matter how long his tenure, how prominent his position, how favorable the electoral arithmetic in his district, how unimpressive and under-financed his last opponent was, . . . almost every member of Congress feels the need to amass a large war chest, just in case."); Issacharoff and Karlan, *supra*, at 1737 (observing that *Buckley*'s scheme "ha[s] made candidates and politicians into perpetual fundraisers").

Even when such an involuntary spiral does not end in corruption, it drains candidates of the time and energy needed to devote themselves to the tasks of substantive governance. As long as the expenditure ceiling is set high enough to permit effective and robust campaign advocacy, the state has a compelling interest in freeing candidates from such a prisoner's dilemma. See *Shrink Missouri*, 528 U.S. at 409 (Kennedy, J., dissenting); *Colorado Repub. Fed'l Campaign Comm., v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting).

The *Buckley* Court never considered the loss of candidate autonomy caused by a failure to establish a generous ceiling on campaign spending. Indeed, in striking down the expenditure limits before it, the *Buckley* Court appeared to be attempting to maximize the autonomy of candidates to spend as much – or as little – as they wished. Given the competitive nature of elections, however, we now understand that a constitutionally-mandated regime of unregulated campaign spending does not maximize candidate autonomy. Instead, it significantly erodes candidate autonomy by pressuring

candidates to raise and spend funds long after sufficient resources for effective and robust advocacy have been amassed, and long after they no longer wish to devote enormous time and energy to the fundraising process. Thus, as long as the ceiling is set sufficiently high to permit effective advocacy, a generous spending cap actually enhances the autonomy of both candidates.[14] Only the coordinated legislative approach envisioned by Justice Kennedy in *Shrink Missouri* that combines appropriate restrictions on campaign contributions and generous ceilings on campaign spending is capable of balancing the competing First Amendment interests of all participants in the electoral process.

C. Generous Expenditure Ceilings Counteract the Risk of Corruption Generated by "Defensive" Fundraising

Because an election is a contest, rival candidates react to each other's activities. When the activity is campaign oratory, the response is the counter-speech needed to inform the electorate. When, however, the activity is a real or perceived fund-raising advantage, a competitive candidate must respond with counter-fundraising, or else risk being unable to respond to a rival's campaign positions. *See* Issacharoff & Karlan, *supra*, at 1708 n.17 ("While spending money is by its very nature susceptible to incremental decision making, electoral outcomes in our winner-take-all system are binary: you either win or you lose. So why cut it close?").

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[14] As Judge Winter noted in his dissent below, nuclear arms and campaign spending are not equivalents. *Landell v. Sorrell*, 382 F.3d 91, 196 (2nd Cir. 2004) (Winter, J. dissenting). The former causes harm; the latter powers democracy. As the Court noted in *Buckley*, there is no general interest in removing money from campaigns. Rather, the salience of the arms race analogy is in the loss of candidate autonomy, leading to frenzied fundraising, excessive dependence on large donors, and inadequate time for substance.

When campaign spending ceilings exist at a level permitting robust oratory, the pressure to react to a rival's fundraising, while real, is mitigated by the ability of each candidate to plateau eventually at a maximum funding level that permits effective advocacy. When spending is capped, therefore, a donor who appears to expect inappropriate returns on his or her "investment" can be replaced by other donors. But when no ceiling exists, a fertile breeding ground exists for improper overtures by candidates, and inappropriate understandings with self-interested donors. That is why, as this Court has often noted, candidates, parties, and their donors, trapped in the prisoner's dilemma, aggressively push the limits of the law in an effort to satisfy the insatiable demand for more funds. *See McConnell*, 540 U.S. at 144, 165; *Colorado Repub.*, 533 U.S. at 457.

This Court has repeatedly recognized that the state has a compelling interest in minimizing real or apparent corruption in the electoral process. See *McConnell*, 540 at 136-37, 143-44; *Shrink Missouri*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28. *Quid pro quo* corruption strikes at the heart of democracy by substituting venal motives for the search for the common good. Apparent corruption is scarcely less dangerous, eroding the faith in the system without which no democracy can flourish. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 528 U.S. at 390.

Not surprisingly therefore, this Court has deferred to the legislature in identifying potential sources of corruption, and putting into place prophylactic regulatory regimes designed to prevent its appearance and/or reality. *McConnell*, 540 U.S. at 137, 165-66, 171; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for

prophylactic measures where corruption is the evil to be feared").

The deference due a legislature's choice of prophylactic means to root out corruption in the electoral system reflects the existence of broad legislative discretion when, as here, First Amendment interests exist on both sides of the regulatory equation. *Cf. Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-75 (1998); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 192-96 (1997); *Burson v Freeman*, 504 U.S. 191 (1992) (plurality opinion). In *Burson*, the Court upheld a ban on electioneering within 100 feet of a polling place in order to protect voters against subtle forms of intimidation. *Id.* at 208-09, 211. The prophylactic ban on speech in *Burson* survived strict scrutiny because constitutionally protected interests lay on both sides of the equation, requiring a degree of deference to the legislative judgment that the interest of speakers had to give way in order to ensure the integrity of the electoral process. *Id.*; *Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring).

In *Buckley*, the Court did not perceive a link between limitless campaign expenditures and the potential for real or apparent corruption. But 30 years of experience has taught that *Buckley* overlooked the competitive nature of an electoral campaign. If an electoral campaign were a unilateral drive in the country, *Buckley*'s estimate of the link between campaign expenditures and corruption would be correct. But campaigns are not drives in the country; they are winner take all automobile races. It is bad enough when one driver in the race has an unfair advantage in fuel. It becomes intolerable when the competitive need for an unlimited quantity of fuel forces both drivers to seek it endlessly under circumstances that breed corruption and erode the capacity of both drivers to consider the direction the cars should go.

D. Generous Expenditure Ceilings Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

Unlimited campaign spending adversely affects the quality of the electoral process in several ways. The never-ending "gyre" of unlimited fundraising diverts the finite intellectual and physical resources of a campaign from substance to the mechanics of fundraising. At worst, the candidate's campaign speech is limited to ideas and themes that will generate financial support from the narrow class of self-interested donors. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy and Participation*, 155 U. Pa. L. Rev. 73 (1994). At best, the candidate's time and attention is so taken up with fundraising that substance becomes an afterthought. Either way, voters are denied the full spectrum of substantive information needed to make an informed political choice.

Moreover, the prospect of raising so much money that a rival can be drowned out by massively superior resources often results in an electorate that has been subjected to a barrage on one side of the issues without effective presentation of the counter-arguments. For example, in the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, while median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. *See* Abramowitz, et al., *supra*, at 75-88 (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

While a generous spending ceiling is not intended to, and does not, assure resource equivalence, it can act to limit the effect of massive resource imbalance by preventing the

loudspeakers of one candidate from being set at a volume that effectively drowns out the speech of a rival.

Voters obviously benefit when candidates are free from settings in which corruption is endemic and attention to substance impossible. A modicum of trust in the system is a necessary incident of a successful democracy. The never-ending scramble for funds made necessary by a constitutionally-mandated failure to cap campaign spending erodes that trust. "Democracy works 'only if the people have faith in those who govern and that faith is bound to be shattered when high government officials . . . engage in activities which arouse suspicions of malfeasance and corruption.'" *Shrink Missouri*, 528 U.S. at 390 (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

Generous spending ceilings remove the unrelenting pressure to raise and spend more than one's rival – and thus permit greater attention to substance in a world not constantly dominated by the need to raise more money. As long as the ceiling is set at a point where it does not interfere with robust and effective advocacy, spending ceilings advance the compelling interest of restoring faith in the democratic process.

Finally, the vast bulk of candidates benefit when they can turn their attention to substance, free from the burden of constantly raising additional funds. The rare candidate may wish to raise unlimited funds to annihilate an opponent, but the vast bulk of candidates wish to raise enough funds to assure effective and robust advocacy, and then to devote themselves to the effective delivery of their ideas. Current practice makes such behavior impossible because candidates must engage in a perpetual financial arms race to prevent an opponent from gaining an advantage. Collective action, in the form of a spending ceiling that permits robust advocacy,

frees the candidate to concentrate on the issues, not on the perennial search for defensive dollars.

The interests of: (a) voters in receiving optimal information; (b) the general public in trusting the electoral system; and (c) candidates in devoting themselves to ideas, are as worthy of First Amendment protection as is the interest of a wealthy candidate in spending limitless amounts to swamp an underfinanced opponent. Since important First Amendment interests exist on both sides of the regulatory equation – and since the area falls within the expertise of the legislature – as long as a spending ceiling is set high enough to permit effective advocacy, the ultimate balance between and among conflicting First Amendment interests should rest with the legislature. *See Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring) (observing that campaign finance restrictions "seek to build public confidence in th[e electoral] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes"); *Landell*, 406 F.3d at 161-63 (Calabresi, J., concurring in denial of rehearing *en banc*) (emphasizing significant First Amendment interest in ensuring that all persons, not only wealthy donors, have an equal right to express the intensity of their political ideas and affiliations); *see also* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 46-47 (2005).

II. Unduly Low Spending Ceilings That Prevent the Expenditure of Resources Needed for Effective Campaign Advocacy Violate the First Amendment

Under any standard of review, unrealistically low campaign spending ceilings violate the First Amendment because they deprive candidates of the ability to expend funds needed for effective advocacy. If either contribution or spending ceilings are too low for effective advocacy, challengers will have a difficult time waging campaigns

against incumbents whose name and messages may already be well known to the voting public. *Shrink Missouri*, 5[illegible] U.S. at 404 (Breyer, J., concurring). On the other hand, the absence of generous spending ceilings, incumbents have demonstrated an overwhelming capacity to swamp challengers by exploiting the built-in fundraising advantage enjoyed by an incumbent.

It is impossible, on the current record, to determine whether the spending ceilings imposed by Vermont will unduly burden candidates in expending funds needed for effective advocacy. The answer to that question requires a fuller hearing below on the practical effect that such limits will have on the ability of candidates in Vermont to expend resources needed for robust discussion of campaign issues. While the district court conducted an inquiry into whether the ceilings accorded with past s[illegible]nding practices, and elicited some evidence concerning the impact of the ceiling on campaigning, with respect, the First Amendment requires a more searching inquiry.

The issue should not be whether ceilings will silence a candidate, or drive campaign speech below historic levels. Rather, it is whether a given ceiling will materially interfere with effective campaign advocacy. This Court has already vested the trial courts with the duty of conducting similar pragmatic fact-based inquiries in at least two related contexts. The identical legal standard is used to measure whether contribution limits are too low to permit a candidate to "amass" sufficient funds for effective advocacy. *See Shrink Missouri*, 528 U.S. at 396.

The Court's ballot access cases teach a similar lesson. When a legislature regulates access to the ballot, this Court tests the statute's constitutionality by asking whether it unduly burdens the ability of candidates and their supporters to attain a place on the ballot. *See Anderson v. Celebrezze*, 460 U.S. 783, 789-90, 792-94 (1983); *Storer v. Brown*, 415

U.S. 724, 728-30 (1974). A reviewing court is obliged to view the statute pragmatically in the context of local conditions and to gauge whether it unduly inhibits ballot access. A similar pragmatic assessment is required to determine whether spending ceilings unduly burden a candidate's capacity for robust and effective campaign advocacy. Since the district court in this case has yet to conduct this inquiry, a remand is necessary.

CONCLUSION

The decision of the court below should be affirmed, and the matter remanded to the District Court for a determination of whether the spending limits before the Court will permit sufficiently effective and robust campaign advocacy to satisfy rigorous First Amendment standards.

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(22)

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In The Supreme Court of the United States

NEIL RANDALL ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

WILLIAM H. SORRELL ET AL.,
Petitioners,
v.
NEIL RANDALL ET AL.,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF EQUAL JUSTICE SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ELLA BAKER CENTER FOR HUMAN RIGHTS, LATINO ISSUES FORUM, GREENLINING INSTITUTE, ASIAN AMERICAN JUSTICE CENTER, CENTER FOR GOVERNMENTAL STUDIES, CALIFORNIA CLEAN MONEY CAMPAIGN, COALITION FOR ECONOMIC EQUITY, AND CALIFORNIA WOMEN'S AGENDA AS *AMICI CURIAE* IN SUPPORT OF WILLIAM H. SORRELL

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INTEREST OF AMICI CURIAE[1]

Amici are organizations committed to improving the lives of all people, but particularly communities of color and the underserved. The Equal Justice Society, National Association for the Advancement of Colored People, Asian American Justice Center, Latino Issues Forum, Greenlining Institute, Ella Baker Center for Human Rights, and Coalition for Economic Equity work to advance the legal and civil rights of communities of color through community education, legal advocacy, public policy research and other efforts. They believe campaign finance reform is necessary to ensure meaningful and adequate participation in the political process.

The Center for Governmental Studies, California Clean Money Campaign and California Women's Agenda join the *Amici* listed above. The Center for Governmental Studies and the California Clean Money Campaign work to ensure that elected officials are receptive to the concerns of all their constituencies and to improve fairness and transparency in government policies and processes. The California Women's Agenda seeks to better the lives of women in all arenas, including the political process. These organizations join this brief because they too believe that campaign finance reform is necessary to guarantee meaningful access to the political process and to elect national and local governments responsive to the needs and concerns of communities of color.

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[1]Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

In an ideal world, men and women of perfect virtue, vision and diversity are elected to public office. They enact laws and approve policies for the greater good unaffected by the special interests and persistent urgings of their most generous contributors. They steadfastly refuse to compromise beliefs, analyses or principles for reelection, their next targeted public office or their own ultimate financial well-being. And, campaigning for office in that ideal world would not necessitate raising and spending tens or hundreds of millions of dollars.

Few issues engender as much fire and energy as campaign finance reform. And that is because in the real world it really matters. It matters to incumbents, to their potential challengers, to vested interests and to citizens, including the communities of color sponsoring this brief—communities of citizens effectively shut out of meaningful participation in our political process. The massive amount of money contributed to and expended on campaigns for public office has an undeniable and monumental impact on who gets elected, who gets access to and is heard by those who are elected and on the ultimate decisions about issues affecting all citizens. It matters in this case because, as the Second Circuit recognized, campaign financing in Vermont is "a far cry from this idyllic vision." *Landell v. Sorrell*, 382 F.3d 91, 118 (2d Cir. 2004) ("*Landell II*") (citing statement of William T. Doyle).

The hard truth is that access, influence and meaningful participation are the private reserve of those who can pay to play in this no-limit game. And the interests and attitudes of those who can pay are very often very different from those who are members of *Amici* organizations on issues such as health care, wages, taxes, public schools, farms and factory

conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this brief that the single greatest obstacle to the ability of communities, municipalities, counties, states and Congress to redress the exclusion of communities of color from the political process is the notion that *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) absolutely bars any attempt to balance the rights of candidates to express freely their ideas with the rights of citizens to participate meaningfully in the political process. Local, state and national electorates have a strong and compelling interest in promoting greater diversity among political participants, preventing corruption and the appearance of corruption, and fostering a belief in the openness and fairness of our form of government—interests best served by contribution and expenditure limits carefully calibrated to respect candidates' rights of expression.

Forty years ago, with the passage of the Voting Rights Act of 1965, this country affirmed its commitment to the principle that all citizens are created equal in the eyes of democracy. Today, the organizations filing this brief submit that the single most important civil rights issue in American politics is the virtual exclusion of communities of color from the electoral process solely attributable to uncontrolled campaign spending. As Martin Luther King, Jr. said, succinctly and with insight in his famous "I Have A Dream" speech at the Lincoln Memorial in 1963: "We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing to vote for."

STATEMENT OF FACTS

I.

VERMONT ENACTED ACT 64 TO PREVENT CORRUPTION AND THE APPEARANCE OF CORRUPTION AND TO PROMOTE MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS.

In 1997, the legislature of Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at VT. STAT. ANN. tit. 17, §§2801–2883 ("Act 64"). Campaign finance regulation is not new to the state of Vermont. Prior to Act 64, the Vermont legislature adopted laws regulating campaign financing in 1916, 1961 and 1971. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 464 (D. Vt. 2000) ("*Landell I*"). But faced with increasingly and prohibitively expensive campaigns, Act 64 represents the first attempt of the legislature of Vermont to adopt campaign spending limits since this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in 1976.[2]

Act 64 is a comprehensive campaign finance reform package that includes regulations of contributions and expenditures related to campaigns for state office. In relevant part, Act 64 limits the amount of expenditures a candidate may make during a two-year election cycle in accordance with the position being sought and the size of contributions that candidates, political committees and

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[2]The complete statement of relevant facts is contained in the court decisions below as well as in Respondent's brief. This brief only concentrates on the points particularly relevant to issues of meaningful political participation for communities of color.

political parties may receive from a single source during a two-year election cycle. *Landell II*, 382 F.3d at 99.

The Vermont legislature found such limits necessary because candidates and elected officials respond and grant access to contributors who make large contributions in preference to those who make small or no contributions. *Landell II*, 382 F.3d at 101. Expert testimony considered by the Vermont legislature showed that "public officials are functionally compelled to sell privileged access through the fundraising system." *Id.* at 100. As Vermont senator Peter Shumlin acknowledged, "[t]here's no question (money) buys access to the system . . . ." *Landell I*, 118 F. Supp. 2d at 465 (parenthetical in original). The trial court found that the Vermont legislative records suggest "that large contributors often have an undue influence over the legislative agenda." *Id.* at 468.

Given the foregoing findings, it is unsurprising that the Vermont legislature also found that increasing amounts of unregulated campaign expenditures accompany decreasing public involvement and confidence in the electoral process. *Landell I*, 118 F. Supp. 2d at 468–69. One expert testified that "nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government." *Landell II*, 382 F.3d at 116.

Indeed, the Vermont legislature found that Act 64 was necessary to implement Article 8 of Chapter I of the Vermont Constitution, which states that "all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office . . . ." *Landell I*, 118 F. Supp. 2d at 468.

II.

THE INCREASING EXPENSE OF CAMPAIGNS EFFECTIVELY PREVENTS MEANINGFUL POLITICAL ACCESS BY COMMUNITIES OF COLOR.

Running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE. In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.* The 2004 presidential race was the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.*

Although attention usually focuses on spending in federal elections, big money pervades state government politics, too. The Institute on Money in State Politics, a nonpartisan, nonprofit organization, compiled nationwide data on the 2000 state legislative and gubernatorial elections. THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002). The study showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. *Id.* at 6. The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8.

More significant than the bare numbers is the direct impact that fundraising has on a candidate's chances of winning. In the 2002 Congressional primaries, candidates

who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG STUDY"). In general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE.[3] At the state level in 2000, 83% of candidates who raised the most money won. 2000 STATE ELECTION OVERVIEW, *supra*, at 4. The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million.[4] *Id.* at 8.

Some argue that limits on campaign spending will not allow challengers to spend enough to defeat incumbents, but the numbers cited above demonstrate beyond a doubt that incumbents beat challengers even without spending limits. Incumbents are a proven commodity so fundraising for them is an easier sell. And contributions to incumbents offer both the benefit of immediate positive influence and the opportunity to place a bet on a proven winner. Available data suggests that campaign limits may produce a different outcome and encourage genuine challenges.[5]

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[3] *At* http://www.opensecrets.org.

[4] On average winners raised $4.1 million, while losers raised only $2.9 million.

[5] In 1974, the citizens of Albuquerque, New Mexico, voted to amend the City Charter, adopting a code of ethics, limits on and disclosure of campaign contributions, and limits on campaign spending. *Homans v. Albuquerque*, 366 F.3d 900, 902 (10th Cir. 2004). Between 1974 and 1995, candidates successfully challenged all four of Albuquerque's incumbent mayors who ran for reelection. *Homans v. Albuquerque*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002). By contrast, nationally, in 1999, incumbent mayors won 88% of their races, and in 2000, incumbents won 126 out of 140 elections. Jubi Headley and Jim

(continued . . .)

In the current pay-to-play system, candidates who lack personal wealth[6] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, cannot compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows that credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are simply unable to raise the funds necessary to compete.[7]

This money-centered focus renders candidates representing minority interests unable to compete for campaign dollars. In 42 out of 50 states legislatures,

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Welfley, *Election Results Indicate Voter Satisfaction with Local Public Servants: Incumbents Win 80 Percent of Their Elections* (Nov. 20, 2000). The amendments were enjoined in 2001. *Homans*, 366 F.3d at 903.

[6]Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG STUDY, *supra*, at 6.

[7]For example, Nathaniel Stampley, a pastor in Wisconsin, decided to run because there had never been an African-American Congressman from Wisconsin. PIRG STUDY, *supra*, at 41. Dr. Stampley raised $7,000 and garnered over 28% of the vote in the primary. *Id.* at 42. His opponent, incumbent Jerry Klezczka, raised $459,000. *Id.* Ben Allen, an African-American attorney, teacher and state representative in Georgia, contributed $20,000 of his own money and raised another $5,300. *Id.* at 17. Although he made it to a run-off, the winner, Charles "Champ" Walker, outspent Allen by $300,000. *Id.* at 18. Leo Martinez, the son of Mexican laborers, lost the Second District Republican primary in New Mexico. *Id.* at 30. Martinez ran a grass-roots campaign and raised $18,000, but lost to the top money raiser. *Id.* Gary Collins, a lawyer and member of the Executive Committee of the Middlesex County NAACP, dropped out of the primary for the Second District in Connecticut. *Id.* at 15. Mr. Collins recounted the story of an African-American woman who came up to him in the street after hearing him speak and handed him $2 dollars in change from her purse to support his campaign. Mr. Collins concluded, "She believed in me enough to want to give me that money, but she didn't understand that even if everyone in town gave me $2 in change, that's not going to get you there." *Id.* at 16.

minority legislators in 2003 raised less money for their next reelection campaign, on average, than their White counterparts. THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003, at 22 (Apr. 2005). Individually, 81.5% of all minority state legislators raised less money than the average raised by the White legislators in their state. *Id. See also* Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and Its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99 (2002) (challenger minority candidates have a more difficult time raising money than White candidates).

The current campaign financing regime similarly results in the significant underrepresentation of racial minorities in elected federal positions.[8] In the current U.S. Senate, there are only five non-White Senators.[9] Historically, only five African-Americans, five Latinos, three Native-Americans, and five Asian-Americans have served in the United States Senate. In the United States House of Representatives, 75 of 438 current members are people of color even though people of color make up approximately a quarter of the population. MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE, CRS Rep. No. RS22007, at 5 (Oct 25, 2005), *available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm.

The necessity of raising tens, even hundreds, of thousands of dollars gives the very small segment of the population capable of writing very large checks an oversized role in determining who gets elected. In the 2002 election,

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[8]Because state office often leads to federal office, pricing candidates of color out of state elections reduces the number of viable candidates of color for federal office.

[9]*See* Minorities in the Senate, *available at* http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Jan. 11, 2006).

less than one-quarter of one percent of the voting age population of the United States made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* And yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nation-wide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUB. PERSP. 29 (2000).[10] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000 and over 80% were college graduates. *Id.* Among the most active donors, over half had annual incomes of over $500,000, and only 4% had annual incomes of less than $100,000. *Id.*

Critically, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race: 99% of the donors were non-Hispanic White. *Id.* Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary

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[10]This survey was conducted by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University.

campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, but approximately 96% were non-Hispanic White. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

Economic barriers to meaningful political participation fall most heavily on the growing population of minorities. Despite the gains of the civil rights movement and growing numbers of minority citizens,[11] the gap in White versus non-

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[11]The racial composition of the United States has changed significantly since *Buckley* was decided in 1976. As evidenced by national census figures, the nation has become increasingly racially diverse. In 1976, 13% of the United States population was non-White, and the vast majority of non-Whites were African-American. U.S. CENSUS BUREAU, RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Over the decades, Whites have accounted for a steadily shrinking percentage of the population. While Whites accounted for 87% of the population in 1976 (*id.*), they accounted for only 77% of the U.S. population in 2004. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2004. Conversely, the percentage of minorities in the U.S. almost doubled between 1976 and 2004, from about 13% to approximately 23% of the population in 2004. Between 1990 and 2000 alone, the minority population in the United States grew by 43%. FRANK HOBBS AND NICOLE STOOPS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS 77 ("DEMOGRAPHIC TRENDS") (Nov. 2002).

Not only has the number of racial minorities increased, the diversity among racial minorities has increased as well. In 1976, over 98% of the population was classified as either White or Black. RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Today, of the over 23% of Americans who identify themselves as non-White, more than half are Hispanic, American Indian and Alaska Native, and Asian and Pacific Islander. DEMOGRAPHIC TRENDS, *supra*, at 77.

Vermont, too, has seen demographic shifts although it remains a state with very small numbers of minority group residents. Though 97% of Vermont's 608,827 residents identify as White, Vermont has followed

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White incomes has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). Minorities have significantly lower incomes than non-Hispanic Whites. In 2000, median annual family income in the United States was $52,000 while the Black family median annual income was $31,000. *Id.* at 13. Put another way, the median Black family in 2000 had an annual income equal to the national median in 1965.

This gap in wealth between non-Hispanic Whites and minorities appears to be growing. A recent study from the Pew Research Center finds that between 1996 and 2002, the median Black and Hispanic household wealth declined by 27%—while the median non-Hispanic White household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002, at 2 (Oct. 2004). The median White household wealth was $88,651—nearly fifteen times that of the median Black household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.*

It is this lack of money—not a lack of interest—that prevents minorities from effectively participating in the political process. The landmark "Citizen Participation Study"[12] found that differences in levels of activity between

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the national trend of growing diversity. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE, Matrices PL1 and PL2. Between the 1960s and the 1990s, the numbers of African-Americans, American Indians and Alaska Natives, and Asians and Pacific Islanders increased almost tenfold. DEMOGRAPHIC TRENDS, *supra*, at A-21 to A-23.

[12]Sidney Verba, Professor of Government at Harvard University, Kay Lehman Schlozman, Professor of Political Science at Boston College, and Henry Brady, Professor of Political Science at the University of California, Berkeley, conducted a large-scale, two-stage scientific survey of the voluntary activity (political, charitable and

(continued . . .)

Whites and non-Whites were far less sharp where the activity involved time rather than money. *Id.* at 467–69. For example, while minorities donate about one percent of all political contributions, they vote at approximately the same rate as Whites. In the November 2000 elections, 53.5% of Blacks and 56.4% of Whites reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000 (2002). Similarly, in the November 2004 election, 56.3% of Blacks, as compared to 60.3% of Whites, reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2004 (2005). Minorities simply lack the disposable income that their White counterparts have to contribute to campaigns in great numbers.

In *Color of Money: 2003*, Public Campaign, a nonpartisan, public interest organization, studied the relationship between campaign money and race and showed that neighborhoods of color are severely underrepresented in the campaign finance system.[13] Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic White ($1.7 billion—85%—came in

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(. . . continued)
religious) of the American public. Sidney Verba et al., *Race, Ethnicity, and Political Participation*, *in* CLASSIFYING BY RACE 354, 355–56 (Paul E. Peterson ed., 1995).

[13]Public Campaign organized the records of more than $2 billion in individual contributions greater than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles by donor's ZIP code. PUBLIC CAMPAIGN, COLOR OF MONEY: 2003, at 1 (Major Findings) (2003). It then compared those records with data on race, ethnicity and income from the 2000 U.S. Census, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds came from predominantly African-American ZIP codes, 1.8% from predominantly Latino ZIP codes, and 0.6% from predominantly Asian and Pacific Islander neighborhoods. *Id.* at 2.

The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic White, and nearly 40% of its households have incomes of over $100,000. This *one* ZIP code contributed more campaign cash than did the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over, 84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over, 102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific American population (representing 3,523,852 people ages 18 and over, 39 times more people than live in 10021). *Id.* at 2. In other words, the evidence demonstrates first, and unsurprisingly, that the most affluent Whites are vastly ***overrepresented*** in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely *underrepresented* among campaign donors.

As diversity increases, the American political landscape necessarily changes. The prominence of issues that uniquely affect communities of color shows that the decades since *Buckley* have brought forth such change. Despite the radical demographic shifts and changing political landscape, communities of color continue to struggle to be heard and for equal treatment. As evidenced by the Court's decision in *Grutter*, there remains a compelling need to intervene and to correct the persisting symptoms of past racial discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

Today, the increasing cost of campaigns recreates the racial disparity and exclusion of communities of color. If the voices of Americans of color continue to be drowned out by moneyed interests, America will fail at least a quarter of its population. Ensuring that all individuals—no matter their race or color—have meaningful opportunities to participate in and influence the political process is essential to the success of American democracy.

LEGAL ARGUMENT

I.

BUCKLEY DOES NOT ESTABLISH A PER SE PROHIBITION AGAINST EXPENDITURE LIMITS.

In *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam), this Court did not hold that expenditure limits were per se prohibited, but rather held that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction on the quantity of political expression imposed . . . ."[14] *Id.* at 55 (emphasis added). Based on a slim court record, the Court assumed that "there is nothing invidious, improper, or unhealthy in permitting such [unlimited] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. As the Second Circuit correctly recognized, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell II*, 382 F.3d at 107–08.

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[14]Because the scope and effect of *Buckley* with respect to expenditures is thoroughly addressed in the parties' briefs as well as in the Second Circuit's opinion in this case, *Amici* focus instead on the fact that expenditure limits are necessary to and justified by the rights of citizens to participate meaningfully in the political process.

In the decades since *Buckley*, empirical evidence reveals that the percentage of minorities who are able to contribute financially to campaigns is almost negligible[15] and that a candidate's financial support bears little relation to his or her support among minority constituents. Support for a particular candidate by communities of color has become irrelevant in an America where the vast majority of campaign contributors are non-Hispanic White.

To be sure, given the large number of minority voters nationally, presidential candidates consider the views of leaders representing communities of color and, in certain states with significant numbers of voters of color, some access is granted by gubernatorial and Senate candidates, especially during the campaign period. But as all studies reflect, access thereafter is very highly correlated with campaign contribution dollars. This disparity leads to at worst, the appearance or actuality of corruption, and at best, an unfair and exclusionary system.

Because contribution limits alone have not—indeed, cannot—adequately further the government's interest in protecting the political process from both actual corruption and apparent corruption, states should be allowed the flexibility to craft well-researched and carefully thought-out campaign finance reform laws that utilize a variety of mechanisms, including reasonable expenditure limits. Without such flexibility, communities of color will continue to be shut out of meaningful participation in our democratic process.

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[15]This lack of participation is not due to a lack of interest as differences in participation rates between Whites and non-Whites became far less pronounced when the political participation involved time instead of money. *See* discussion at p.10, *supra*.

II.

PROMOTING MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS IS AN ADDITIONAL COMPELLING INTEREST SUFFICIENT TO SUPPORT VERMONT'S REASONABLE LIMITS ON CAMPAIGN SPENDING.

Vermont put forth five interests that it believed were sufficiently compelling to warrant its reasonable limits on campaign spending. The Second Circuit found that two of those interests—"avoiding the reality and appearance of corruption in elective politics and government" and assuring that "candidates and officeholders [will] spend less time fund-raising and more time interacting with voters and performing duties"—taken together, supported Vermont's expenditure limits and declined to evaluate the remaining interests. *Landell II*, 382 F.3d. at 115, 125.

Among the three interests advanced by Vermont that the Second Circuit did not evaluate was Vermont's interest in "protecting equal access to political participation." *Id.* at 115. Although the sufficiency of this interest was not discussed by the Second Circuit, the *Landell I* court acknowledged that spending limits are an appropriate response to the compelling governmental interest of "[p]rotecting access to the political arena." 118 F. Supp. 2d at 482–83. In fact, the *Landell I* court found that "the categorical preservation of free speech and association cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government." *Id.* at 493.

The *Landell I* court correctly recognized it was charged with reconciling competing interests. Indeed, *Amici* believe that the tension between the interest in ensuring meaningful participation in the political process for all members of the

electorate and the First Amendment interests in political speech lies at the heart of the debate over the constitutionality of campaign expenditure limits. As the *Landell I* court noted, "the exercise of those [free speech] freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others." 118 F. Supp. 2d at 493.

Courts balance competing constitutional interests often. Indeed, this Court has recognized the need to balance First Amendment protections of political speech against core democratic interests. As Justice Breyer pointed out in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the "Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ."[16] *Id.* at 402 (Breyer, J., joined by Ginsburg, J., concurring). When faced with these competing interests, the Court does not privilege one interest over another, but weighs the interests and seeks solutions that maintain the integrity of American democracy. *See id.*

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[16]Examples of this balance abound. In *Nixon*, Justice Breyer offered two examples where speech has been restricted to protect other core democratic interests. Specifically,

> in Congress, for example, . . . constitutionally protected debate, Art. I, §6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate. (*Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring) (citing *Storer v. Brown*, 415 U.S. 724, 736 (1974)))

Similarly, in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld restrictions under the Hatch Act limiting the political activity of federal employees. Even in *Buckley*, when evaluating contribution limits, the Court weighed the government's interest in the prevention of corruption against First Amendment freedoms.

While expenditure caps limit to some extent the paid political expression of a wealthy few, they are important to ensure Americans, especially its people of color, can meaningfully participate in the political process. Any analysis of expenditure limits must keep in mind that the special attention given to political expression under the First Amendment is rooted in the protection of these democratic principles.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court recognized that government has an essential interest in promoting political participation by Americans of color: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. The *Grutter* Court found a compelling government interest in ensuring that minorities participate in American's education system and stated that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But the government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to government leadership, and the government has a vital interest in keeping America's political system open to all members of society. As we work together as a country to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine these accomplishments if we effectively deprive the graduates of these programs of office,

of access, and of a sense that the government understands and is receptive to their views.

This Court has endorsed important interests of the government in promoting meaningful political participation. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." *Id.* at 206 n.88 (citation and internal quotation marks omitted). Political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court upheld a prohibition on corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging meaningful political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate is an election that appears up for sale.[17]

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[17]In an *amicus* brief submitted to the Court, Senator Mitch McConnell challenges Vermont's interest in "protecting equal access to political participation." *See* McConnell Amicus Brief at 13-18. Although the *Buckley* Court found that the "interest in equalizing the financial resources of candidates" is not a convincing justification (*Buckley*, 424 U.S. at 56), it did not reject the interest in protecting access to political participation. Meaningful political participation is simply not synonymous with "the equalization of political speech" interest rejected in *Buckley*.

Neither Respondents nor *Amici* argue for reasonable campaign spending limits based on an abstract principle that all candidates should have the same amount of money to spend. Such an argument misses the point. Rather, at issue here are the consequences of entirely unrestrained spending, as documented by the Vermont legislature and in study after study, including the resulting virtual exclusion of communities of color from the political process and from political office. Nothing less.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth . . . ." *Id.* at 666. Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. *Id.* at 144; *see id.* at 136–41 & nn.1–17. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. (*Id.* at 143)

"[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*; *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[18] The diminishment of minorities' rights to participate in the political process also touches on fundamental constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes . . . ." H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views).

Even as it enacted major reform, Republican Congressmen predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .

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[18] 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a more virulent variety than exists today. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds with which they may outspend opponents, candidates for office are forced to give access and time to those who can provide money.

The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." 424 U.S. at 48–49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). One valid basis for upholding limits on campaign expenditure limits, Justice Breyer noted, is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process." *Id.* at 401 (citations omitted). The Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be "wholly foreign" is a political system in which free speech is measured only in dollars and in which major segments of society are excluded and are as powerless to influence the choice of candidates and public policy as they were decades ago. Legislators and citizens can and should be permitted to balance competing and compelling government interests with carefully drawn limits that still protect—indeed encourage and permit—widespread communication of ideas and positions. The Vermont

legislature did so in enacting Act 64. The district court and Second Circuit did so in upholding parts of Act 64 and *Amici* ask that it be sustained.

The Court's decision will not only affect the citizens of Vermont, but it will determine whether the next generation of Americans of color throughout the nation will be given a voice and a place at the political table.

CONCLUSION

Amici urge the Court to hold that governments have compelling interests in promoting meaningful participation by *all* members of the electorate and that this interest is sufficient to support Vermont's limits on campaign spending.

DATED: February 8, 2006.

Respectfully,

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Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

WILLIAM H. SORRELL, *et al.*,

Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,

Cross-Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* FORMER SENATORS BILL BRADLEY AND ALAN SIMPSON IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici former Senators Bill Bradley and Alan Simpson urge the Court to affirm the ruling of the United States Court of Appeals for the Second Circuit in favor of Respondents. This case addresses a constitutional question of great magnitude concerning this Court's First Amendment jurisprudence in the context of campaign finance reform.[1] The issue presented herein is whether the State of Vermont's campaign expenditure limits are justified by a compelling government interest.

Bill Bradley is a former United States Senator, and a Democrat from New Jersey. He was first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997. In addition, Senator Bradley ran for the Democratic Party nomination for President of the United States in the 2000 election cycle.

Alan Simpson is a former United States Senator, and a Republican from Wyoming. He was also first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997.

Having served the nation in the United States Senate, *amici* swore an oath to "support and defend the Constitution of the United States" and to "well and faithfully discharge the[ir] duties."[2] In addition to their service in

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

the Senate, *amici* have raised millions of dollars for their campaigns, for their respective parties, and for other candidates. *Amici* are proud of their service in the legislative branch; however, as former members of a coordinate branch, they feel compelled to advise the Court of their utmost concern for the problem presented. With a sense of continuing obligation to serve to the nation, *amici* file this brief in support of Respondents.

SUMMARY OF THE ARGUMENT

This case raises the question whether the immense time commitment of fundraising detracts excessively from the effective performance of elected officials. Without expenditure limits, campaign costs have escalated and fundraising has become an inordinately time-consuming job for candidates and office holders. Due to the excessive demands of fundraising, it is difficult for elected officials to fulfill their duties. As a result, the quality of representation has declined, and the integrity of elected office has been undermined. Thus, protecting the time of elected officials from the burdens of constant fundraising presents a compelling government interest, an interest which was not before the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

For these reasons, the Court should affirm the constitutionality of the State of Vermont's campaign expenditure limits. In the alternative, *amici* urge the Court to hold that protecting the time of candidates and elected officials from the onerous demands of fundraising is a compelling government interest that justifies campaign finance reform measures, and to remand to the lower court for a

determination of whether the Vermont statute is narrowly tailored to achieve this compelling government interest.

Because fundraising increasingly dominates the time of candidates, the integrity of the American system of republican government is deteriorating, as time is taken from the many and focused on asking for money from the few. The instant case provides the Court with an opportunity to consider issues that are central to the integrity of our system of representative democracy, as States and localities across the nation seek to address the impact of fundraising on campaigns and on officials' performance in elected office.

I. THE SPIRALING COSTS OF CAMPAIGNS TAKE ELECTED OFFICIALS AWAY FROM THEIR SWORN DUTIES.

A. In The Absence Of Spending Limits, Campaign Costs In Federal, State And Local Elections Have Escalated.

In the 30 years since the Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), the costs of running a successful campaign for local, state and national office have rapidly escalated. In 1978, *Amicus* Senator Bradley spent $1,688,499 in his campaign for a United States Senate seat in New Jersey. CENTER FOR RESPONSIVE POLITICS, BILL BRADLEY; bradbil.pdf, *available at* http://www.opensecrets.org. In 1990, a mere 12 years later, *Amicus* Senator Bradley spent nearly $12.5 million in his reelection bid, raising approximately forty thousand dollars per week, every week for six years. Likewise, in the 1990 senatorial race in Wyoming, *Amicus* Simpson spent $1,443,298 to win re-election, 3.3 times the amount spent in 1978. CENTER FOR RESPONSIVE

POLITICS, ALAN SIMPSON; simpsala.pdf, *available at* http://www.opensecrets.org.

Overall Congressional candidate fundraising increased 425 percent between 1978 and 2000, compared to 170 percent inflation during the same period. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 7 (2003). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from $359,577 to $848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase. Similarly, the average victorious Senate campaign in 1986 cost $3,067,559 compared to $7,389,176 in 2000 – a 154 percent increase, adjusted for inflation. *Id.*[3]

In the realm of presidential politics, spending has escalated at an even more alarming rate. In his bid for the 2000 Democratic Presidential Nomination, Senator Bradley, although no longer a member of the Senate, raised $8,607,781 in campaign contributions in his most successful fundraising quarter. FEDERAL ELECTION COMMISSION, "Large Fundraising Quarters in Pre-Election Years For

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[3] The following breakdown is particular noteworthy. In 1992, the average Senator had to raise nearly $13,000 each week for the entire six-year term in order to amass the amount that a winning Senate race would cost. Herbert Alexander, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992). By 2001, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise $10,000 *per day*. 145 Cong. Rec. S12575, S12608 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer). In fact, she raised money at almost twice that rate. For her 2004 re-election, Sen. Boxer raised a total of $16.7 million. Of that, in the 2003-04 cycle she raised $13.8 million. Divided evenly over two years and 365 days per year, this amount equals $18,904 per day, every day, weekends and holidays included. http://www.opensecrets.org/politicians/summary.asp?CID=N00006692&cycle=2004.

Presidential Primary Campaigns," *available at* http://www.fec.gov (measured from October 1, 1999 through December 31, 1999). Sitting Vice President Al Gore, the eventual Democratic Party nominee for President, had his largest fundraising quarter in the first quarter of 1999, during which time he raised $8,881,976. *Id.* (measured from January 1, 1999 through March 31, 1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in 91 days, while still serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the 2004 presidential election, which shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and raised a combined total of $496.6 million in contributions from individuals. FED. ELECTION COMM'N, REPORT OF RECEIPTS AND DISBURSEMENTS: BUSH-CHENEY '04 INC. (Sept. 20, 2004), *available at* http://www.fec.gov; REPORT OF RECEIPTS AND DISBURSEMENTS: JOHN KERRY FOR PRESIDENT INC. (Sept. 20, 2004), *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As A Result, Elected Officials Spend An Excessive And Ever-Increasing Proportion Of Their Time Raising Funds For The Purposes Of Re-Election And Election To Higher Office.

Spiraling campaign costs cause elected officials to spend an excessive and ever-increasing proportion of their

time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress spend many hours – every day and every week raising money, "dialing for dollars,"[5] and attending fundraisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized. . . . When I was running, I was

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[4] *See, e.g.*, 147 Cong. Rec. S2603 (daily ed. Mar. 21, 2001) (statement of Sen. Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch an effective campaign."); 133 Cong. Rec. S7782 (daily ed. Sept. 21, 1997) (statement of Sen. Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A1 (quoting Sen. Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," (Statement of House Minority Leader Robert Michel); "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," (Statement of Rep. Dave Durenberger); Larry Makinson, SPEAKING FREELY 36-37 ("When I was here in Washington I would go over to the [National Republican Congressional Committee] or the Senatorial Committee offices to make telephone calls for an hour, two hours every day. When I was home in Florida . . . that's the bulk of what I did. It's a very time-consuming process." (Statement of Rep. Bill McCollum).

spending about two hours a day on the phone raising money. Minimum. Six days a week." Martin Schram, SPEAKING FREELY 38.

Moreover, in order to meet the inordinate demands of a successful fundraising campaign, elected officials must begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. As one Senator put it, "[a]s soon as a Senator is elected here, that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S1053 (daily ed. Feb. 22, 1988) (statement of Sen. Harkin). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan. 6, 1987) (statement of Sen. Byrd).[7] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman).

Indeed, fundraising not only takes time, but it also literally takes officials away from their work. Elected officials travel frequently in order to raise money, not only within their own states, but also to states with high

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[7] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for re-Election*, THE OREGONIAN, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election day).

concentrations of wealthy donors.[8] Candidates and elected officials cast a wide net – beyond their constituents and voters, and outside their home region – in order to raise the money needed to run a successful campaign. For example, in South Dakota in 2004, 92% of the money raised by incumbent Senator Tom Daschle came from outside of the state, as did 78% of that raised by his opponent, Jon Thune.[9] A general breakdown of 2004 fundraising data shows a chase to several hot spots around the country with high levels of campaign contributions, with the New York City metropolitan area leading with nearly $150 million, and Washington DC not far behind at $135.4 million.[10] Other stops on the campaign money tour include Los Angeles and San Francisco on the west coast, Chicago in the Midwest, and Boston and Philadelphia back on the east coast.[11] As a result, candidates must spend much of their time flying back and forth

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[8] For example, in 1986, then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 NAT'L J. 1448, 1448 (1990); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1998) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer") (Statement of Rep. Wyche Fowler).

[9] Statistics are published at http://www.opensecrets.org/races/instate.asp?ID=SDS1&cycle=2004&special=N.

[10] *Id.* For the top 10 most expensive Senate races from the 2004 cycle, reflecting the 20 major party candidates, the average candidate received 39.1% of her funds from out-of-state-contributors. This data was compiled from information published at www.opensecrets.org.

[11] http://www.opensecrets.org/overview/topmetro.asp?cycle=2004.

across the country – from New York to Hollywood – raising money.[12] As Sen. Wyche Fowler commented, "It takes two to three years of constant travel – you cannot, under today's system, raise [enough] money in your own state. And therefore, the time expands exponentially, because you're crisscrossing the country."[13] While this speaks of conduct at the federal congressional level, these concerns are just as prevalent at the local level. Candidates across all offices, state and federal, and across all parties, are spending considerable time raising money.[14] In Vermont specifically, the record below amply demonstrates that candidates and elected officials constantly faced the need to leave the State in order to find sufficient campaign

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[12] As one House member put it, "people would be genuinely unhappy about how much time members have to spend on fund-raising. . . . And in many cases, because there is such competition for the dollars, you can't do it over the phone. You've got to get on a plane and fly to New York or Chicago or Miami or Dallas or Los Angeles. Hollywood, Wall Street." SPEAKING FREELY (1995) at http://www.opensecrets.org/pubs/speaking/speaking03.html (statement of Rep. Dennis Eckart).

[13] *Id.* (statement of Sen. Wyche Fowler). Senator Dennis DeConcini of Arizona reflected on a fundraising event as follows: " . . . And I'm in New York. Beautiful apartment facing the park. I'd never been there before. Didn't know the people who owned the apartment, who'd just raised me 46,000 bucks." SPEAKING FREELY (1995), available at http://www.opensecrets.org/pubs/speaking/speaking02.html (Statement of Sen. DeConcini). This reflects a transactional, commerce-like approach where money replaces ideas as the sole object, and candidates and elected officials blindly follow the money.

[14] For example, one study found that throughout the nation, 55 percent of candidates for state-wide office devoted more than one-quarter of their time to fundraising activities. Paul S. Herrnson and Ronald A. Faucheux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), at http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

cash.[15] Thus, fundraising not only takes time, it also takes the candidates and officeholders away from their voters and constituents.

The demographics of the donor class[16] further illustrate the way politicians and elected officials spend their time. The Center for Responsive Politics reports, "Less than one-tenth of 1% of the U.S. population gave 83 percent of all itemized campaign contributions for the 2002 elections."[17] Donors who contribute the maximum $2,000 allowed under federal law represent approximately one-tenth of 1% of the nation's adult population.[18] Under the current system, an efficient candidate focuses on raising hundreds of thousands of dollars from those who can give the most. This time is spent not with ordinary voters and constituents, but rather with the wealthy few who can help the candidate most quickly reach her

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[15] Republican State Senator William Doyle observed, "Fundraising in recent years has concentrated on out-of-state fundraising events. The reason for this is that it's much easier to raise out-of-state-money, either in Washington, New York or California." Floor Speech of Senator William Doyle (R), Ex. Vol. I, E-0092. Democratic State Senator Cheryl Rivers testified that Vermont legislators are expected to attend out-of-state fundraising events sponsored by parties and PACs, where donors gain access to the legislators. (Trial testimony of Senator Cheryl Rivers, Tr. VII-58-61). In terms of numbers, 73 percent of campaign contributions to Gov. Howard Dean's 1994 campaign were from out-of-state donors, primarily in the health care industry. Tr. IX-198 (trial testimony of Anthony Pollina).

[16] This terminology is effectively described and developed in Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PENN. L. REV. 73 (2004).

[17] http://www.opensecrets.org/pressreleases/DonorDemographics02.asp.

[18] http://www.opensecrets.org/overview/DonorDemographics.asp?cycle=2002. Contributions of $200 or more come from about one-half of one percent (0.52%) of the nation's population. *Id.*

fundraising goals. Out of necessity, time – that precious commodity – is lavished on the few.

Further, on a practical, everyday level, fundraising takes elected officials away from their place of work in the halls of government. For example, Members of Congress are not permitted to make fundraising calls from their Congressional offices, 18 U.S.C. § 607(a), and must rent separate office space for those purposes. As one Representative stated, "I rented an office on Capitol Hill, and between votes [in the House] during the time I was running for the Senate, I just camped out in that office most of the time and made phone calls." Schram, SPEAKING FREELY, *available at* http://www.opensecrets.org/pubs/speaking/speaking03.html (Statement of Sen. Mel Levine) (1995).

In sum, the current system relentlessly pressures office holders to spend a vast amount of their time fundraising, to the exclusion of other pursuits of campaigning or the public business.

C. The Time Spent Fundraising Diminishes The Quality Of Representation That Elected Officials Provide, And Undermines The Integrity Of The Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." James R. Carroll, *Senate Rejects Limits on Donations*, THE COURIER-JOURNAL, Mar. 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators do not devote their time to legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with their

colleagues. As Senator DeConcini stated, "[fundraising] takes away from your ability to represent your constituents, or to do your legislative work." Martin Schram, SPEAKING FREELY 38.

Thus, many legislators neglect their legislative duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[19] Legislators often feel that they do not have the time to meet with or directly represent their constituents. As Representative Christopher Shays lamented, "[Elected officials] spend far too much time fundraising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H339 (daily ed. Feb. 13, 2002) (Statement of Rep. Shays). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING

[19] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, L.A. TIMES, July 24, 2000, at A3 (detailing a Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amounts of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, both Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[20] Representative Vin Weber stated, "when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending to their sworn duties and raising money for the purposes of re-election or election to a higher office.[21] One Congressman stated that the time

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[20] *See, e.g.*, 145 Cong. Rec. H8225, H8236 (daily ed. Sept. 15, 1999) (statement of Rep. Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens. . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H6937, H6943 (daily ed. Aug. 3, 1998) (statement of Rep. Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing. Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S5858 (daily ed. May 15, 1991) (statement of Sen. Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

[21] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators

(Continued on following page)

spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[22] While elected officials may prefer to spend their time serving the public, political survival demands that they make these choices.

Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office.[23] Because they are consumed with fundraising, candidates do not have time

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surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1998); *see also* Larry Makinson, SPEAKING FREELY 39 (2d Ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Rep. Tim Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," (Statement of Rep. Leslie Byrne) and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," (Statement of Sen. Howard Metzenbaum).

[22] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had "been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

[23] Naturally, a large percentage of candidates will be current officeholders. There are incumbents seeking re-election, as well as elected officials seeking higher office. An analysis of the 2004 Senatorial elections shows that 68 individuals ran for office for 34 Senate seats, and that of these 70% were elected officials. CQ VOTING AND ELECTIONS COLLECTIONS: EXPERT ANALYSIS, DEMOGRAPHICS AND DATA.

during their campaigns to engage the issues or the voters, to debate their opponents or to discuss ideas.[24]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed an "institutional concern about the integrity of the U.S. Senate." Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM, at 4, 51 (1992). Former Senator Dennis DeConcini said, "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and raise money for my next election. And that always has bothered me from the standpoint of what I

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[24] *See, e.g.*, Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, PHILADELPHIA DAILY NEWS, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face."); 133 Cong. Rec. S7782 (Statement of Sen. Hollings) ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Rep. Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, ROCKY MOUNTAIN NEWS, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer saying that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

think the people elected me to do." Schram, SPEAKING FREELY 40.[25]

The most recent presidential election cycle provides a final compelling example of the negative effects of unlimited spending. The two major party nominees, both current office holders, decided to forego the public financing available in the primaries.[26] Instead, President Bush and Senator Kerry raised money at a pace of at least one million dollars per day, every day, while also serving as federal office holders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that the time of these two public servants, and that of all elected officials, is a compelling interest worth protecting.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO *BUCKLEY V. VALEO*.

A. *Buckley v. Valeo* Allows That A Compelling Government Interest Could Be Presented That Would Justify Campaign Expenditure Limits In Light Of The Interest In Preserving The Integrity Of Our System Of Representative Democracy.

In *Buckley*, this Court held that laws that restrict campaign contributions or expenditures must meet exacting

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[25] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[26] President Bush raised these sums even though he faced no serious primary opponent.

scrutiny.[27] The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived exacting scrutiny on the grounds that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 142-45 (2003) (extending this rationale to justify limits on soft money contributions). As set forth in greater detail below, just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Thus, *Buckley* and this Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of

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[27] *Amici* suggest that the Court may also consider whether strict scrutiny is required when reviewing campaign finance reform measures, or whether a lesser level of scrutiny would suffice. Irrespective of the level of scrutiny, *amici* submit that there is at least a compelling government interest.

representative democracy.[28] Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley* spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[29] Similarly, Justice Breyer, in an opinion joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws,

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[28] Contrary to Judge Winter's dissent in *Landell v. Sorrell*, 382 F.3d at 188-89, this issue has not yet been addressed by this Court and was not considered or developed as a compelling state interest in Buckley.

[29] Several appeals courts and judges have opined that time protection is a compelling government interest. In the instant matter, the Second Circuit observed that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit has affirmed that the time protection rationale is a compelling government interest. A concurrence in the Sixth Circuit offers a similar perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). In a recent Tenth Circuit case, Circuit Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans v. City of Albuquerque* and *Rue v. City of Albuquerque*, 366 F.3d 900, 911 (10th. Cir. 2004), *cert. denied*, 125 U.S. 625 (2004). Nonetheless, majorities in the Sixth and Tenth Circuits ultimately found that there was no compelling government interest justifying the expenditure limitations at issue.

so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

B. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital To Our System Of Representative Democracy And Would Serve A Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to the principles set forth in *Buckley v. Valeo*. Fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure limits serve a compelling government interest: they safeguard the integrity of the electoral process and our Republic, and they protect the time of legislators who are duty-bound to serve their constituents and abide by their oath of office.

Protecting the core functions of elected officials is central to the strength of the American Republic. The American Republic is founded on the notion that elected representatives serve the people. As James Madison wrote in FEDERALIST 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art.

I; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[30] This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Likewise, the Constitution directly protects the core functions of legislators in the Speech or Debate Clause, which protects Members of Congress as they carry out their essential functions as legislators, including debating and voting on legislation: "The Senators and Representatives shall ... be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House." U.S. CONST. art. I, § 6. This Court has held that the Speech or Debate Clause is to "be read broadly to effectuate its purposes."[31] Further,

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[30] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S. CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

[31] *United States v. Johnson*, 383 U.S. 169, 180 (1966), citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *See also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation").

in *Powell v. McCormack*, this Court held that the purpose of the Speech or Debate Clause is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks. . . ."[32] The Clause has been held to protect more than just literal speech and debate: "it would be a narrow view of the constitutional provision to limit it to words spoken in debate."[33] The protection of the Clause has been applied to various acts, "to things generally done in a session of the House by one of its members in relation to the business before it."[34] This clause underscores the profound importance of these critical legislative functions. "[D]istracting or deterring even a few individual members of a collective legislative body can, of course, undermine the capacity of the body as a whole to do its lawmaking work . . . "[35]

Accordingly, the government has a compelling interest in protecting the time of elected officials who are increasingly forced to spend large amounts of time fundraising instead of legislating, debating, and serving their constituents and the nation.[36]

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[32] *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

[33] *Kilbourn*, 103 U.S. at 204.

[34] *Id.* The Speech or Debate Clause is not without limits. Its protection "has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 624.

[35] *Id.*

[36] *Amici* do not argue that the Speech or Debate Clause on its own provides the sole basis for upholding Vermont's campaign expenditure limits, but it reinforces the central point that there is constitutional support for protecting the time of legislators to do their jobs in an unencumbered fashion.

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. This time could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vincent Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994).[37] When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

C. Because Fundraising Drains Candidates' Time, Campaign Expenditure Limits Directly Serve A Compelling Government Interest In Protecting The Integrity Of The Electoral Process.

Active and vocal campaigns are integral to American constitutional democracy. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citing *Buckley* and noting that the Supreme Court has "recognized repeatedly that 'debate on the qualifications of candidates

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[37] *See also* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U.-CHIC. L.J. vol. 4 http://www.ssrn.com/abstract=816244 (forthcoming 2006), 40-44 ("Time stolen for fundraising activities thus both diminishes the representation provided by an individual elected official and the overall capacity of the body to function to its fullest.").

[is] integral to the operation of the system of government established by our Constitution"). Campaigns are the heart of a healthy electoral process. As the *Buckley* Court observed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. at 14-15. Thus, campaigns provide for an instrumental dialogue between candidates and voters that is central to the "uninhibited, robust and wide-open" public debate that in large part defines the republican form of government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[38] Campaign spending limits directly protect the time of candidates so that they can, in any manner they choose, participate fully in this essential conversation.

This Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in

[38] Campaigns serve a critical function as public fora in which the people express their views. "The conversational model posits that the backbone of democracy, the source of much of the popular respect it commands, and hence much of its strength and stability, is to be found . . . in involvement of the electorate in the democratic conversation." Robert Bennett, *Democracy as a Meaningful Conversation*, 14 CONST. COMM. 481, 501 (Winter 1997).

preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brown*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). Indeed, the Court has found a compelling government interest in preventing the erosion of public "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). Thus, preserving the integrity of the electoral process is a compelling government interest "basic to a democratic society." *United States v. UAW-CIA*, 352 U.S. 567, 570 (1957).

The time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Protecting the integrity of our system of representative democracy is a compelling government interest.[39] Because candidates and elected representatives are at the heart of

[39] The Eighth Circuit, in upholding Minnesota's voluntary spending limits, favorably observed that the time protection rationale is "well settled" as a compelling government interest. *See Rosentiel v. Rodriguez*, 101 F.3d 1544, 1554 (8th Cir. 1996). The Eighth Circuit stated that "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Id.* at 1553. *See also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law because "such programs 'facilitate communication by candidates with the electorate,' [and] free candidates from the pressures of fundraising.")

the American republic, the government has a compelling interest in protecting their time.[40]

D. Vermont's Campaign Limits Directly Serve This Compelling Interest.

The record in this case demonstrates that Vermont's campaign expenditure limits directly serve a compelling government interest in protecting the integrity of our system of representative democracy. In enacting the law in question, the Vermont General Assembly specifically found that the demands of fundraising take excessive time away from the people's business. 1997 Vt. Laws P.A. 64 (H.28) (finding No. 1). After a full trial, the District Court agreed, finding that "the need to solicit money from large donors at times turns legislators away from their official duties." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). This was confirmed by the Second Circuit: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Landell v. Sorrell*, 382 F.3d 91, 121-22 (2d Cir. 2004). In sum, Vermont's campaign expenditure limits protect the time of candidates and elected officials, allowing them to redistribute their time as they see fit, to fully engage in the democratic process.

Moreover, Vermont's expenditure limits are the most narrowly tailored option to serve the compelling government

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[40] For a fuller discussion of the importance of campaigns in American democracy, *see* Alexander, *Let Them Do Their Jobs*, at 34-38; "Campaigns are conversations that educate candidates and empower the people through political dialogue, enhancing representative democracy." *Id.* at 34.

interest described above. Other campaign finance reforms, including those that have already been adopted and approved by this Court – individual contribution limits and public financing – do not adequately serve this interest.

Petitioners argue that individual contribution limits contributed to the fact that in order to meet the costs of running a successful campaign, candidates must spend countless hours raising money from individual donors. This raises the question whether individual contribution limits are a more appropriate response to the problem. However, in *Buckley* the Court acknowledged that individual contribution limits directly serve the compelling government interest in preventing corruption or the appearance thereof. 424 U.S. at 26. Moreover, as this Court observed in *Shrink*, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Nixon v. Shrink Mo. Gov't P.A.C.*, 528 U.S. 377, 395 (2000). Without individual contribution limits, the system would be even more vulnerable to corruption from those seeking access, power and influence.[41] Unlimited contributions are not the most narrowly tailored solution to the time protection problem.[42]

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[41] For further analysis of the numerous studies which document the fact that money can buy votes and change legislative outcomes, *see* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 U.MINN. J.L. & INEQUALITY 239 (2005).

[42] For further explication, *see* Alexander, *Let Them Do Their Jobs*, at 49-54.

Petitioners also suggest that Vermont could turn to public financing to address the time protection concern. VT Repubs Brief at 44. But that also represents a false alternative that does not well serve the compelling government interest. Its effectiveness is limited because public financing schemes are, under prevailing case law, voluntary. Public financing laws provide public funding to a candidate if she chooses to abide by a spending cap. But because these laws rely on voluntary compliance, multi-millionaire candidates and those with prodigious fundraising machines routinely opt out of public funding plans that will not match what private funds or fundraising will generate. As set forth above, the most recent presidential election provides a clear example of the weakness of public financing at the highest level of government. President George W. Bush and Sen. John F. Kerry rejected – with complete political justification – public financing in the primary election cycle, because they could easily raise much more with their own fundraising operations.[43] Instead, they spent their time raising money at the combined rate of a million dollars per day, thus dedicating more time to raising money and less to the business of the people and other campaign events. Thus the Achilles heel of public financing is that without mandatory limits on publicly-financed elections, all candidates remain free to spend unlimited amounts if they reject the public money. A voluntary system of public financing inherently fails to

[43] Governor Dean also opted out of the public financing of the 2004 presidential primaries. *See, e.g.*, http://www.opensecrets.org/presidential/index.asp.

serve the compelling government interest in time protection.[44]

The State of Vermont has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.[45] Other States and localities have taken related steps to enact meaningful campaign reform, efforts that *amici* have long admired.[46] To the extent that the States are laboratories of democracy,[47] *amici* submit that this Court should clarify that experimentation like that undertaken by the State of Vermont is not per se banned by *Buckley*.

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[44] For a fuller analysis of the shortcomings of voluntary public financing schemes, *see* Alexander, *Let Them Do Their Jobs* at 54-59.

[45] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, *Trends in Campaign Financing*, THE BOOK OF STATES, Vol. 35, at 275 (2003).

[46] *See, e.g.*, 142 Cong. Rec. S377 (daily ed. Jan. 25, 1996) (Statement of Sen. Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[47] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The limits adopted by the State of Vermont are narrowly tailored to serve a compelling government interest. Without spending limits, elected officials at all levels spend inordinate amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating, and meeting with constituents – and the quality of campaigns. Protecting the integrity of both elected office and of our system of representative democracy – both in the performance of elected officials and in the conduct of campaigns – is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should first, affirm the Second Circuit and hold that time protection is a compelling government interest, and second, uphold Vermont's common-sense regulations as narrowly tailored to serve this compelling government interest.

CONCLUSION

For the foregoing reasons, the Court should uphold the ruling of the United States Court of Appeals for the Second Circuit.

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IN THE

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NEIL RANDALL, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, *Petitioners*,

v.

NEIL RANDALL, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld Vermont's contribution limits as constitutional under standards established by this Court, *e.g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and in light of legislative and district court findings to which deference is owed.

2. Whether this Court should decline to consider the constitutionality of Vermont's expenditure limits now, and instead affirm the court of appeals' remand order so that the lower courts may resolve open issues and thereby either pretermit the need for constitutional adjudication by this Court or provide a more complete record if such adjudication becomes necessary.

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INTEREST OF AMICI CURIAE[1]

Amici curiae, Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Martin Meehan, were the four principal sponsors of the Bipartisan Campaign Reform Act of 2002. Amici have devoted enormous time and energy to ensuring that our nation's campaign finance laws are effective.

The Court's review of Vermont's contribution and expenditure limitations may have repercussions for future legislative efforts, at both the federal and state levels, to limit the corrosive effects of money in the political process. For decades, legislators have depended on a consistent line of precedent from this Court that maintains the basic principles articulated in *Buckley* v. *Valeo*, 424 U.S. 1, 23 (1976), recognizes the critical government interest in maintaining the integrity of the electoral process and government offices, and shows appropriate deference to legislative judgments made in support of this interest. Amici respectfully urge the Court to uphold Vermont's contribution limits, consistent with its prior precedent, and to affirm the order by the court of appeals remanding the issue whether Vermont's expenditure limits are constitutional, thereby staying this Court's hand pending further development of the issue by the lower courts.

STATEMENT OF THE CASE

In 1997, the Vermont General Assembly held extensive legislative hearings to assess the need for campaign finance reform. After considering testimony from 145 witnesses, the General Assembly enacted Act 64, which established limits

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that the brief was prepared in its entirety by amici and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

on the amounts that candidates may accept as contributions and on the amounts that candidates may spend.

Act 64 establishes ceilings on the amounts candidates may accept from a single source. Vt. Stat. Ann. Tit. 17, § 2805(a)-(c). Candidates for statewide office may accept up to $400, state senate candidates may accept up to $300, and candidates for state representative or local office may accept up to $200.

Act 64 limits candidate expenditures based on the office sought. Candidates for governor may spend up to $300,000, candidates for lieutenant governor may spend up to $100,000, and candidates for other statewide offices may spend up to $45,000. Vt. Stat. Ann. Tit. 17, § 2805a(a)(1)-(3). Candidates for state representative and state senator may spend up to $2000 and $4000, respectively, with candidates in multi-seat districts permitted additional expenditures. *Id.* at § 2805a(a)(4)-(5).

Petitioners brought suit against, among others, Vermont's attorney general, arguing that Act 64 unconstitutionally infringes upon their First Amendment rights to free speech and association. The district court held a bench trial from May 8 to June 2, 2000, at which it heard extensive testimony from current and former Vermont office holders and expert witnesses. Among other things, the witnesses testified about the history of campaign finance practices in Vermont, the cost of elections, and how Act 64 might improve Vermont politics. The district court upheld the contribution limits but found the expenditure limits to be unconstitutional. Pet. App. 24a-25a.

Both petitioners and respondents appealed, with petitioners urging the court of appeals to overturn the contribution limits and respondents urging it to uphold the expenditure limits. The panel unanimously affirmed the district court's holding that the limits on contributions to candidates were constitutional, concluding that the "governmental interest in eliminating actual and apparent corruption is sufficient." Pet. App. 169a. The panel split on the expenditure question. The majority held that two interests proffered by

the state—prevention of corruption and the appearance thereof, and preservation of the time of candidates and elected officials—were potentially compelling enough to support the limits but that the district court's findings did not resolve whether Act 64's expenditure limits were narrowly tailored to serve those interests. The majority, accordingly, remanded the case to the district court to consider the issue of narrow tailoring. *Id.* at 91a. The dissenting judge, disagreeing that the state interests asserted to support the expenditure limits were compelling, would have affirmed the district court's decision striking down those limits. *Id.* at 194a. Rehearing en banc was denied, with four judges dissenting from that decision.

SUMMARY OF ARGUMENT

Vermont's contribution limits are constitutional under longstanding and consistent precedents of this Court. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court upheld a federal $1000 contribution limit. The Court concluded that contribution limits impose only a marginal restriction on speech and are thus subject to less exacting scrutiny than expenditure limits. The Court further concluded that both corruption and the appearance of corruption are constitutionally sufficient justifications to support contribution restrictions. *Id.* at 26. Within this basic framework, the Court has declined invitations to second-guess legislative judgments that establish particular contribution limits. *See, e.g., id.* at 30; *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 n.5 (2000); *California Med. Ass'n* v. *Federal Election Comm'n*, 453 U.S. 199, 201 (1981) (plurality opinion). This Court rightly refrains from "fine tun[ing]" the precise limits that legislatures adopt based on their experience and expertise and has explained that contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

Applying these well-established standards, the court of appeals correctly upheld Vermont's contribution limits. The

legislative and trial evidence overwhelmingly demonstrates that those limits are: (1) justified by Vermont's interest in avoiding actual and apparent corruption; (2) closely drawn to meet that indisputably important interest; and (3) ample enough to allow robust campaigning and debate in Vermont.

This Court should decline at this stage in the litigation to review the constitutionality of Vermont's expenditure limits and should reject the invitation to revisit its holding in *Buckley* concerning expenditure limits. The court of appeals neither sustained nor struck down Vermont's expenditure limits; instead, it remanded the case to the district court for further fact-finding and analysis regarding whether those limits are narrowly tailored. Those further proceedings may pretermit the need for this Court to engage in constitutional adjudication, which should not be embarked upon unnecessarily or prematurely. If the issue ultimately returns to this Court, the Court will have the considerable benefit of further lower court findings and analysis to inform its decision.

Buckley did not establish a *per se* constitutional bar on expenditure limits. Rather, it held that any such limit would need to meet the most exacting scrutiny. This Court should not reconsider that holding and should not assess its application to Act 64 before proceedings in the lower courts have concluded.

ARGUMENT

I. VERMONT'S CONTRIBUTION LIMITS ARE CONSTITUTIONAL UNDER THE STANDARDS ESTABLISHED IN *SHRINK MISSOURI* AND IN LIGHT OF THE DEFERENCE OWED TO THE LEGISLATIVE AND ADJUDICATIVE FINDINGS OF RECORD

A. This Court Has Consistently Sustained Contribution Limits And Has Deferred To The Line-Drawing Expertise Of Legislatures In Doing So

Buckley v. *Valeo*, 424 U.S. 1 (1976), established two principles that, for three decades, have guided constitutional review of state and federal campaign contribution limits. First, contribution restrictions entail "only a marginal restriction" on a contributor's ability to communicate and are therefore subject to less rigorous scrutiny than expenditure

restrictions. *Id.* at 20. Second, both corruption and the appearance of corruption are constitutionally sufficient governmental interests to support contribution restrictions. *Id.* at 26 (finding it "unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation").

Six years ago, in *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court applied these principles to Missouri's limits on the amounts candidates may receive in contributions. The Court found "no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern" state regulations and reaffirmed that contribution restrictions should receive more relaxed scrutiny than expenditure restrictions; that is, the challenged regulation need only be "'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 387-388 (quoting *Buckley*, 424 U.S. at 25), 397.[2] The Court recognized that *Buckley* had already found that the "'prevention of corruption and the appearance of corruption'" is a sufficiently important interest. *See id.* at 388 (quoting *Buckley*, 424 U.S. at 25-26).

The Court, consistent with prior cases, reaffirmed that where corruption or the appearance of corruption is identified as a basis for legislative reform, courts should be particularly reluctant to second-guess the legislature's finding.[3]

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[2] The Court clarified that, while it had applied that level of scrutiny in *Buckley* in the context of associational rights, it had "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." *Shrink Mo.*, 528 U.S. at 388.

[3] This deference was already well established. *See, e.g., Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (observing the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo.*, 528 U.S. at 391. Although "mere conjecture" will not suffice, *id.* at 392, the Court recognized that, even without the benefit of legislative history (which Missouri could not provide), "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.* at 395. Thus, the Court placed an evidentiary burden on challengers to meet even a minimal showing of a need for limits and to demonstrate that the legislature was mistaken. *See id.* at 394 (finding the plaintiffs had failed to make "any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here").

The Court in *Shrink Missouri* also established the principle that contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." 528 U.S. at 397.[4] Applying that principle to Missouri's contribution limits, the Court upheld a $1,075 contribution limit, concluding that, even considering approximately three-fold inflation, it was not "so different in kind" from the $1,000 limit sustained in *Buckley* as to warrant second-guessing the Missouri legislature's tailoring of the statute. *Id.* at 395. On remand, moreover, the Court of Appeals for the Eighth Circuit con-

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measures where corruption is the evil feared."); *California Med. Ass'n*, 453 U.S. at 199 & n.20 (sustaining the Federal Election Campaign Act's limit on contributions to multi-candidate political committees and recognizing the provision as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*," even if it was not the "least restrictive means of protecting the integrity of its legislative scheme") (plurality opinion).

[4] Similarly, in *Buckley*, the Court cautioned that "distinctions in degree become significant only when they can be said to amount to differences in kind." 424 U.S. at 30.

cluded, following "the teachings of the Supreme Court," that contribution limits for other state offices (which ranged from $275 to $1,075) were justified "in their entirety." *Shrink Mo. Gov't PAC* v. *Adams*, 204 F.3d 838, 840, 842 (8th Cir. 2000).

The importance of judicial deference to legislative judgments was most recently reaffirmed in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), where the Court, in upholding the major provisions of the Bipartisan Campaign Reform Act ("BCRA"), explicitly acknowledged that "the respect that the Legislative and Judicial Branches owe to one another" was important to its analysis. *Id.* at 137. Such deference is a common and critical thread in the Court's campaign finance jurisprudence. *See, e.g., Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 162 n.9 (2003) (deferring to congressional judgment concerning restrictions on corporate campaign contributions); *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-465 (2001) (rejecting the argument that a provision limiting coordinated expenditures by political parties could have been more closely tailored and observing that "Congress is entitled to its choice" between "limiting [parties'] contributions and limiting [their coordinated] expenditures"). Indeed, there is an important interplay between the Court's deference to legislative judgments in this area of the law and the reliance legislatures place on the Court's steady precedent in tailoring their legislative judgments. *See McConnell*, 540 U.S. at 137 (acknowledging the importance of "the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny").

B. Vermont's Contribution Limits Are Justified By An Important, Judicially Recognized State Interest

Vermont's justifications for the contribution limits it selected in Act 64 are the same as those this Court sustained in *Buckley* and *Shrink Missouri*. Although the amount of evidence that a court requires in support of an asserted state interest "will vary up or down with the novelty and plausi-

bility of the justifications raised," the particular interest in avoiding actual or apparent corruption arising from large contributions is "neither novel nor implausible." *Shrink Mo.*, 528 U.S. at 391. Accordingly, states generally need not engage in extensive fact-finding to establish their interest in curtailing the risk that contributions deemed to be large in the context of a particular state's political practices may give rise to actual or apparent corruption or the phenomenon of "politicians too compliant with the wishes of large contributors." *Id.* at 389.

In this case, the evidentiary basis for the law enacted by the Vermont General Assembly was ample. In the years leading up to the enactment of Act 64, public officials in Vermont frequently expressed concern regarding the corrosive effect of money in politics. In 1997, the Governor advised the Vermont General Assembly, based on his experience, that "money does buy access and we're kidding ourselves and Vermonters if we deny it." Ex. Vol. III at E-0902.[5] Politicians were not alone in recognizing the problems; the media reported extensively on campaign practices that aroused suspicion of improper influence exercised by donors of sums of money that were large in the context of Vermont politics. Ex. Vol. III at E-0746-E-0826. As the district court noted, "[s]uch barometers have been used by many other courts in evaluating the governmental interest that underpins contribution limits." Pet. App. 56a (citing

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[5] *See also* "Improving the Quality of Elections: Campaign Reform in the New Age of Shame: Return of the State Capitals" (speech by Vermont Secretary of State James Douglas, delivered Oct. 23, 1991), Ex. Vol. III at E-0911; Christopher Graff, *Money Changes Opinions*, Burlington Free Press, Apr. 27, 1997, Ex. Vol. III at E-0763 (quoting Senator Jeb Spaulding as stating that "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and passage or failure of bills around here"); Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, Rutland Herald, Apr. 8, 1997, Ex. Vol. III at E-0772 (quoting Senate President Pro Tem Peter Shumlin as stating that "[t]here's no question (money) buys access to the system .... In my view, it adversely influences a citizen Legislature and elections for that matter." (first alteration in original)).

Daggett v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000); *Adams*, 204 F.3d at 841-842).

Moreover, the General Assembly did its homework. Committees considering the Act conducted 65 hearings and heard more than 145 witnesses testify about, among other things, contribution patterns in Vermont's previous elections, the cost of campaigning, citizen polls concerning public perception of corruption, and whether particular donation amounts struck constituents as suspiciously large in the unique context of Vermont politics. Ex. Vol. I at E-0120-E-0186.

As the district court found, the evidence "overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics and that voter apathy is on the rise." Pet. App. 36a. The record further demonstrated "that large contributors often have an undue influence over the legislative agenda." *Id.* As to public perceptions of corruption, the district court pointed to a poll that determined that 74% of Vermont's voters felt that ordinary voters lacked influence over Vermont politics; the same poll found that 71% of voters thought that corporations had too much influence, and 70% thought that wealthy individuals had too much influence. Ex. Vol. III at E-0852.[6]

The record also includes the testimony of state legislators based on their extensive first-hand experiences in Vermont. Senator Cheryl Rivers testified that large donors often shape Vermont's legislative agenda and even determine whether a bill receives sufficient support from Senate leadership to move forward. Tr. VII-56-62. She also testified that the pressure to raise money makes it more difficult to pursue legislative initiatives contrary to the wishes of inter-

[6] This Court and others have considered opinion polls to be appropriate measurements of public sentiment in assessing the validity of statutes like this one. *Shrink Mo.*, 528 U.S. at 394; *Daggett*, 205 F.3d at 457-458; *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 229 (D.D.C.), *aff'd in part, rev'd in part on other grounds*, 540 U.S. 93 (2003).

est groups that give large contributions. *Id.*[7] Senator Elizabeth Ready explained that the influence of campaign funding "starts at the beginning at election. The interests are involved in getting people elected. They may even be involved in recruiting candidates. They are involved all the way through, and they are very involved once you get to the legislative process within the statehouse." Tr. IX-87.[8]

Experts—both those of petitioners and respondents—agreed that large contributions at least appeared to affect legislators' voting behavior in Vermont. Professor Thomas Stratmann testified for the defendants that his empirical studies demonstrate that campaign contributions have a significant impact on legislative voting. Tr. VI-147 ("[W]hen legislators receive higher contributions, they are more likely to vote in the interests of the contributor."); *see also* Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, Ex. Vol. IV at E-1533. The district court noted that even plaintiffs' experts agreed that "[t]he more favors government has to give out, the more resources that people will spend to obtain those

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[7] Senator Rivers testified, moreover, that "it's like the arms race. If you want to be in leadership in the Vermont House or Senate, the main criteria appears to have become your ability to raise large amounts of money from some of the organizations that the lobbyists that you see at the statehouse every day represent." Tr. VII-56. She also admitted that "when I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent." Tr. VII-72. Former Congressman Peter Smith explained that when a bill is introduced, legislators typically ask "what's the industry position, what's the union position . . . what does the money want." Tr. VIII-25. Strikingly, Congressman Smith related that the National Rifle Association told him that if he reversed his position, "they would call off the dogs and they would make sure I got plenty of money and that I would be reelected." Tr. VIII-47.

[8] Although it may be inappropriate for this Court to defer to the legislature's determination whether contribution limits have the effect of "insulat[ing] legislators from effective electoral challenge," *Shrink Mo.*, 528 U.S. at 404 (Breyer, J., concurring), the district court in this case correctly concluded that the arguments that incumbents would be disproportionately affected by the contribution limits were "across the board . . . speculative" (Pet. App. 60a).

favors." Ex. Vol. VI at E-2202 (letter from Dr. John Lott); *see also* Pet. App. 38a.

Against this backdrop, there can be little doubt that the district court and the court of appeals correctly concluded that the legislative and adjudicative record supported Vermont's conclusion that contribution limits were needed to protect state politics from actual and apparent corruption. The evidence "clearly surpasse[d] the quantum of evidence offered and accepted as sufficient in *Shrink Missouri PAC* and would meet an even higher standard if one were applicable." *Daggett*, 205 F.3d at 458.

C. Vermont's Contribution Limits Are Closely Drawn

"[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (quotation omitted). The Court in *Shrink Missouri*, observing this, held that in determining whether to sustain particular contribution limits, courts give substantial deference to legislative judgments and should not attempt to "fine tune" the precise levels of the limits. 528 U.S. at 388.[9] Courts typically allow legislatures to "weigh competing constitutional interests in an area in which [they] enjoy[] particular expertise" and give them "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. Thus, contribution limits will be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

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[9] *See also State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 620 (Alaska 1999) (concluding that a legislature should determine appropriate contribution limits depending on the particular circumstances of the jurisdiction); *Daggett* v. *Webster*, 81 F. Supp. 2d 128, 139 (D. Me.), *aff'd following limited remand*, 205 F.3d 445 (1st Cir. 2000) ("If contribution limits are permissible, differences in their level from state to state should reflect democratic choices, not court decisions." (footnote omitted)).

As in *Buckley*, *Shrink Missouri*, and *McConnell*, ample record evidence here supports the court of appeals' holding that Vermont's contribution limits—in the unique context of Vermont—are closely drawn to meet that state's interests. Indeed, after holding extensive hearings, the Vermont legislature made the following specific findings:

> In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.
>
> In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.
>
> In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

1997 Vt. Laws Pub. Act 64, § 1(a)(3), (6), (7) (legislative findings).

The evidence presented at trial buttressed these legislative findings. The district court concluded that the limits did not have a severe impact on political dialogue based on evidence that: (1) during recent elections, less than 10% of the individual contributions exceeded the limits; and (2) the limits were high enough to permit effective campaigning in the recent Burlington mayoral election. Pet. App. 39a-41a.

The district court, for example, relied on the expert testimony of University of Vermont Professor Anthony Gierzynski. He considered the 1994, 1996, and 1998 elections and concluded that "it is clear that the contribution limits set by the legislature in 1997 would affect only a small percentage of contributors." Ex. Vol. III at E-0950. Approximately 90% of contributions to recent statewide candidates were under the limits set by Act 64, and more than 90% of contri-

butions were under the limits for state senate and house candidates. *Id.*

Professor Gierzynski opined, moreover, that "[t]he effect of the limits on senate and house candidates' revenues would be minimal." Ex. Vol. III at E-0954. Specifically, the percentages of revenue that would have been affected for state senate candidates were 10.1% in 1994, 10.8% in 1996, and 18.2% in 1998; the percentages of revenue affected in state house elections were 3.2% in 1994, 5.2% in 1996, and 6.5% in 1998. *Id.* As Professor Gierzynski explained, "[t]hese numbers suggest that the 1997 Act's limits would affect a small and replaceable part of senate and house candidates' revenues." *Id.*[10] Notably, Professor Gierzynski compared Vermont's contribution limits to those considered by the Court in *Shrink Missouri*. He concluded that "relative to the size of the constituency—and thus size of the campaign that is necessary—Vermont contribution limits (with the exception of the limit on Chittenden County senate candidates) are as generous or more generous than the Missouri limits recently upheld by the U.S. Supreme Court." *Id.* at E-0958.[11]

The district court also found that the evidence demonstrated that "[i]n the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state." Pet. App. 41a-42a. Even some of petitioners' witnesses agreed that contributions in

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[10] In the three elections considered, 89.6%, 82.6%, and 73.6% of the candidates for the Vermont House received *no* contributions over the $200 limit. Ex. Vol. III at E-0979. Approximately 40% of the Senate candidates during those years would have needed to make no adjustments. *Id.* In the 1994 and 1996 races, moreover, only 20% of the Senate candidates accepted more than three contributions that were over the $300 limit. *Id.*

[11] Because Chittenden County is a six-member senate district, the ratio of the contribution limit to the size of the constituency is somewhat different, which renders the contribution limits "slightly less generous." *Id.* at E-0954.

amounts greater than those Act 64 allowed were large in the context of Vermont. *See, e.g.*, Tr. II-201 (Patch). Having also considered the witnesses' near unanimous testimony that the limits set by the Vermont legislature allowed for meaningful contributions, *see, e.g.*, Tr. IV-101 (Summers); Tr. VII-80 (Rivers); Tr. IX-225 (Pollina), the court found that the contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public," Pet. App. 59a.

Also before the district court was testimony concerning whether candidates would be able to wage effective campaigns under new limits. Several candidates, campaign managers, and past officials testified that Act 64 would not prevent them from running effective campaigns. For example, Mark Snelling testified that even with Act 64's $400 contribution limit, a candidate for statewide office would be able to raise $300,000 to $400,000. Tr. I-40.[12] The district court also looked closely at the 1999 Burlington mayoral race, which at the time of trial was the only large election to have been held under the new limits. *Cf. Shrink Mo.*, 528 U.S. at 396 (examining campaigns that had been held under the contribution limits). The court concluded that mayoral candidates in the Burlington race remained able "to amass sufficient resources to run effective campaigns." Pet. App. 41a. This conclusion was well founded; bound by Act 64's limitation of $200 on contributions, the Burlington mayoral candidates in 1999 raised more than *five times* the amount raised by the candidates in the 1997 race. Ex. Vol. III at E-0957. This evidence also strongly indicates that the contribution limits will not unduly impair fundraising in competitive races, as petitioners suggest.

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[12] Former Secretary of State Don Hooper testified that "of course" he would be able to run an effective campaign under Act 64's contribution limits. Tr. V-23. Former Lieutenant Governor Peter Smith testified that the $300 and $400 contribution limits for statewide elections "absolutely" allow candidates to run effective campaigns. Tr. VIII-53.

Petitioners contend that there is no evidence that Vermont's prior contribution limits were insufficient.[13] But the evidence of actual or apparent corruption on which the legislature and district court relied occurred in the period during which the prior contribution limits were in force. Indeed, the Vermont General Assembly specifically found that "contributions larger than the amounts specified in this act are considered by the legislature, candidates and officials to be large contributions." 1997 Vt. Laws Pub. Act 64, § 1(a)(3). The record evidence demonstrates, moreover, that contributions in significantly lower amounts than the maximum permitted prior to Act 64 apparently led to lawmakers granting additional access to the contributors.[14]

A comparison to the facts of *Shrink Missouri* is instructive. In that case, the Court of Appeals for the Eighth Circuit concluded that Missouri's limits of $525 per election for Senate and $275 for House were constitutional. *Adams*, 204 F.3d at 842-843. As the district court in this case noted, Vermont's ratio of contribution limits to the size of constituency is quite close to that considered in Missouri: 0.00068 for Vermont compared to 0.00040 for Missouri. Pet. App. 58a. Constituency size is relevant to the analysis, for a candidate is not forbidden from soliciting contributions from other districts or other states, and yet the size of the candidate's constituency necessarily limits the number of voters that the candidate needs to reach. On that basis, Vermont's limits compare favorably with those upheld in Missouri.

The decision of the Court of Appeals for the First Circuit in *Daggett* is also instructive. There, the court of appeals examined a Maine law that limited campaign contributions to $250 for state representatives and state senators.

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[13] Prior to Act 64, candidates were limited to contributions from individuals of no more than $1,000 per election or $2,000 per cycle when a primary was held. 1988 Vt. Laws Pub. Act 263, § 3.

[14] For example, Senator Elizabeth Ready testified that when donors affiliated with the slate industry made $500 donations, they appeared to receive preferential treatment. Tr. IX-113.

Among other things, the court of appeals noted that the limit of $1,075 that the Supreme Court had upheld in *Shrink Missouri* applied in districts with more than 250,000 constituents, while the $250 limit at issue in *Daggett* applied in districts that averaged only 8,000 constituents. 205 F.3d at 459. After examining the campaign finance patterns in Maine and the typical costs of Maine campaigns, the court of appeals concluded that the $250 limit was constitutional. *Id.* at 459-461. *See also Montana Right to Life Ass'n* v. *Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (upholding Montana's statutory limits of $100-$400 on campaign contributions made by individuals).

In sum, the holding of the district court, based on an extensive legislative and trial record, that Vermont's limits are closely tailored to address the threat and appearance of corruption in Vermont politics should be affirmed.

II. THE COURT SHOULD NOT NOW ADDRESS THE CONSTITUTIONALITY OF VERMONT'S EXPENDITURE LIMITS, BUT SHOULD DEFER SO THAT THE LOWER COURT PROCEEDINGS ON REMAND MAY EITHER CLARIFY THE RECORD OR ALTOGETHER ELIMINATE THE NEED FOR CONSTITUTIONAL ADJUDICATION BY THIS COURT

It is premature for the Court to review the constitutionality of Vermont's expenditure limits because the lower courts have not conclusively decided the issue and there is no countervailing need for an expeditious resolution. A critical inquiry remains before the district court on remand, and prudence counsels against this Court's addressing a delicate constitutional issue at this time, when the lower courts have not finally decided the issue in the first instance, and when it may ultimately prove unnecessary for this Court to do so. In these circumstances, this Court should affirm the court of appeals' remand order. Should the Court conclude that it is appropriate to address the expenditure issue in some manner, it should, at most, clarify that *Buckley* did not purport to impose a *per se* ban on expenditure limits.

A. The Interlocutory Procedural Posture Of This Case Counsels Strongly Against A Premature Constitutional Ruling By This Court On The Expenditure Issue

The interlocutory status of this case counsels against premature review of the expenditure issue. The court of appeals did *not* dispose of the question whether Vermont's expenditure limits are constitutional. Although the court of appeals found that Vermont's need for expenditure limits was supported by certain state interests, Pet. App. 91a, it did not reach a conclusion as to the second, essential prong of its First Amendment analysis: whether the particular limits Vermont adopted were sufficiently narrowly tailored to meet constitutional dictates. Instead, the court remanded the case to the district court for consideration of that critical issue. Because the district court had found spending limits *per se* unconstitutional, it had not examined "whether the legislature might have chosen either another type of regulation besides mandatory spending limits" (*e.g.*, voluntary limits) "or higher limits, that would achieve the goals . . . and yet impinge less on the First Amendment rights of candidates and voters." *Id.* at 164a.[15]

This Court's usual practice is to avoid deciding a case on the merits where the court below has not finally resolved the issue. "This reluctance is justified not only in the obvious cases in which lower court rulings have forestalled development of a trial record, but also in cases in which the Court has simply lost the advantage of prior appellate scrutiny of

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[15] The court of appeals correctly articulated the three-part test for determining whether the limits were narrowly tailored: "(1) the extent to which the State's interests are advanced by the regulation; (2) the extent to which candidates can conduct 'effective advocacy' under the limits; and (3) whether the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights." Pet. App. 148a. Applying this test to Vermont's expenditure limits, the court of appeals concluded that the first two prongs of the test were satisfied but remanded to the district court for further consideration of the third prong. *Id.* at 164a.

the record and deliberation of the arguments." 17 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4036, at 38-39 (1988). *See also National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ([W]e do not decide in the first instance issues not decided below."); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975), *overruled in part on other grounds by Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) ("[B]ecause the District Court did not discuss [whether there was a procedural due process violation], and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance."). The Court recently practiced just this sort of caution in *Wisconsin Right to Life, Inc.* v. *Federal Election Commission*, No. 04-1581, 2006 WL 152676 (U.S. Jan. 23, 2006) (per curiam). There, the petitioner had brought an as-applied challenge to BCRA's electioneering communications provisions, which the district court dismissed based on its view that *McConnell* categorically foreclosed any such challenges. After rejecting that reading of *McConnell* and concluding that it was unclear whether the district court had also suggested that the particular ads at issue "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," the Court declined to reach the merits and remanded for further review. *Id.* at *1 (quotation omitted).[16]

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[16] The Court has not hesitated to deny a petition for writ of certiorari in such circumstances or, if necessary, dismiss a petition as improvidently granted. *See Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (explaining, in context of remand by court of appeals, that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); James Wm. Moore, 22 *Moore's Federal Practice* § 405.03[2][a][ii][A] (3d ld. 2005) (explaining that, although absolute finality is not required, "[t]he Court does not ordinarily grant certiorari . . . especially if further proceedings might affect the issue on which certiorari is sought"); *Wainwright* v. *City of New Orleans*, 392 U.S. 598, 598 (1968) (Harlan, J., concurring) (dismissing writ and describing record as "too opaque" to permit resolution of federal issue).

Here, there are sound reasons to permit the lower courts to further address the expenditure limit. First, the district court needs to consider whether Vermont's spending limits are the least restrictive means of furthering the state's asserted interests, *i.e.*, whether no other type of regulation could have advanced the state's interests while impinging less on First Amendment rights. In this connection, it may be relevant that the record shows that when Act 64 was originally introduced in the House, it contained a provision—not unlike the federal law sustained in *Buckley*—that provided for voluntary public financing of election campaigns tied to a candidate's acceptance of voluntary spending limits. Pet. App. 159a-160a. Notably, the record shows that the proposed voluntary spending limits appear to have been made mandatory in one of the House committees, but "[i]t is unclear from the current record why this change occurred, and the [d]istrict [c]ourt made no findings on this point." *Id.*

Second, even if the district court were to conclude that only mandatory spending limits could advance the state interests at issue, it must still consider why the particular amounts the Vermont legislature chose were preferred over higher amounts. Pet. App. 161a. The limits Vermont chose differed from those in the original Senate and House bills, and the record does not definitively indicate the basis on which the Vermont legislature selected the final amounts. *Id.* at 161a-162a.

As the court of appeals recognized, these unanswered questions bear on judicial review of the legislature's judgment. Pet. App. 166a ("Indeed, even a modicum of deference to the legislature and consideration for principles of federalism would seem to require consideration of its reasons for rejecting a potentially less-restrictive alternative scheme.").

Independent of this need for the district court to address fully the least restrictive means prong is the uncertainty of the result on remand. On remand, the district court or the court of appeals could decide that a voluntary spending limit, for example, is a less restrictive means, potentially

rendering further review of petitioners' claim by this Court unnecessary.

B. The Court Should Not Opine On A Delicate Constitutional Question That May Be Unnecessary To Decide This Case

The importance of the constitutional issues at stake, particularly in the context of reviewing a state statute, provides further reason to exercise judicial restraint. This Court has long followed the doctrine, grounded in the "basic principles regarding the institution of judicial review and this Court's proper role in our federal system," *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14-15 (1993) (Blackmun, J. dissenting, joined by Souter, Stevens, and O'Connor, JJ.), that it "'ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'" *id.* at 14 (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). *See also Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nor will the Court "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quotation omitted).[17]

The Court has applied this "cardinal" rule in First Amendment cases. *See, e.g., Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) ("Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it."). This practice reflects the Court's understanding that it

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[17] *Cf. Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960) (remanding case to lower court for determination of two non-constitutional questions based on the "settled canons of constitutional adjudication [dictating that] the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled").

should not invoke its extraordinary authority to pass on the constitutionality of a law when other means are available for deciding the case. *See Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (*per curiam*) (holding, under the avoidance principle, that where both a procedural and constitutional question must be answered to determine the appealability of a habeas petition, the former should be decided first); *Petite* v. *United States*, 361 U.S. 529, 531 (1960) (noting the "settled rule that the Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" (citation omitted)).

Should Vermont's expenditure limits survive a full review in the lower courts, there may well be reason for this Court to address constitutional limits on spending caps. Now is not that time. Although some would push the Court to reexamine *Buckley*—and to do so as soon as possible—doing so now would neither serve the orderly resolution of this case nor the broader institutional interests in constitutional adjudication that are at stake.

C. At Most, The Court Should Affirm The Court Of Appeals' Holding That *Buckley* Did Not Foreclose Expenditure Limits In All Circumstances

Should the Court offer guidance to the lower courts in connection with the remand, it should not go beyond the narrow question whether *Buckley* purported to ban all expenditure limits. The court of appeals, in remanding the case, correctly observed that *Buckley* "did not rule campaign expenditure limits to be per se unconstitutional," and that "narrowly tailored spending limits that secure clearly identified and appropriately documented compelling government interests" might conceivably pass muster under *Buckley*. Pet. App. 95a. This Court could affirm that narrow observation without breaking new constitutional ground.

Although *Buckley* recognized that the standard for sustaining an expenditure limit, like that at issue here, is a high one, the Court did not categorically reject any legislative effort to meet this heavy burden under any factual circumstances. The *Buckley* Court observed that Congress had

imposed the expenditure limitations contained in the Federal Election Campaign Act ("FECA") with the aim of protecting certain interests. 424 U.S. at 56-57. The Court rejected those interests as insufficient to justify the expenditure limits at issue on the record before it and thus struck them down. *Id.* In so doing, however, the Court was careful not to hold that expenditure restrictions were *per se* invalid.

In rejecting the necessity of FECA's expenditure limits to combat corruption, the *Buckley* Court tied its reasoning to the record before it, which demonstrated that the Act's contribution and disclosure limits already combated the "major evil" associated with large campaign expenditures: reliance on large contributions. 424 U.S. at 55. Similarly, the Court's rejection of the assertion that the expenditure limits were necessary to reduce the incentive to circumvent the contribution limits was based on its conclusion that "[t]here [was] *no indication* that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations [would] be insufficient to police the contribution provisions." *Id.* at 56 (emphasis added).

Thus, *Buckley* left open the possibility that legislatures might identify, under different factual circumstances, compelling interests that could justify campaign spending limits, provided the measures were narrowly tailored. Indeed, this Court has never embraced a categorical rule that a particular form of regulation of speech (or funding of speech) is unconstitutional—no matter how compelling the governmental interest at stake and no matter how narrowly tailored the rule. Consistent with this Court's overall approach to the First Amendment, *Buckley* did not adopt a wooden, *per se* approach and, instead, focused on the particular circumstances presented in that case.

CONCLUSION

The Court should affirm the court of appeals in upholding Vermont's contribution limits and affirm the court of appeals order remanding the expenditure issue pending full resolution by the lower courts.

Respectfully submitted.

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Petitioners/Cross-Respondents,

v.

WILLIAM H. SORRELL *et al.*,
Respondents/Cross-Petitioners.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Vermont's limits on candidate expenditures and campaign contributions are unconstitutional infringements on essential First Amendment freedoms.

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the First Amendment prohibits Vermont from placing severe restrictions on candidate expenditures and campaign contributions. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an official elected to federal office with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, *"Reform" Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the 1997 Vermont Campaign Finance Reform Act.

STATEMENT

1. All campaign finance restrictions are constitutionally suspect, because political speech is at the heart of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the government's generalized interest in removing corruption and the appearance of corruption from politics can support restrictions on campaign *contributions*, but is insufficient to justify limitations on candidate *expenditures*. *Id.* at 55. As the Second Circuit recognized, Vermont lawmakers passed the 1997 Vermont Campaign Finance Reform Act ("Act 64"), Vt. Stat. Ann. tit. 17, §§ 2801-2883, with the specific intention of

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right To Life, Inc. v. FEC (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 614 (1996) (No. 95-489).

"provok[ing] a test case to overrule *Buckley* with regard to expenditure limits." Pet. App. 201a.

Act 64 includes restrictions on speech that extend well beyond what *Buckley* sanctioned. The Act limits all candidate expenditures during a two-year election cycle. Vt. Stat. Ann. tit. 17, § 2805a. The spending limits vary from $2,000 for a state representative in a single-member district to $300,000 for governor. *Id.* Incumbent spending is limited to 85-90% of these limits depending upon the office sought. *Id.* § 2805a(c). The Act defines candidate "expenditures" broadly to include "anything of value[] paid . . . for the purpose of influencing an election [or] advancing a position on a public question," *id.* § 2801(3), which even encompasses the use of a candidate's own car and telephone, and also money spent complying with the Act. Pet. App. 225a-226a, 229a-232a, 241a-242a. A candidate cannot avoid the Act's spending limits by resorting to personal funds: The Act applies equally to candidates who finance their campaigns with political contributions and to those who rely exclusively upon their own funds. Vt. Stat. Ann. tit. 17, § 2805a(a).

Act 64 considers an expenditure by any noncandidate to be "related"—and therefore attributable to a candidate's expenditure limit—where it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by, or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The Act creates a rebuttable presumption that expenditures made by a political party or PAC are "related" if they primarily benefit six or fewer candidates. *Id.* § 2809(d). The cost of rebutting the presumption is assessed against the candidate's expenditure limit, even if the candidate prevails. Pet. App. 225a-226a.

Act 64 also sharply restricts contributions to candidates from a single source, a political party, or a PAC, with limits

ranging from $200 to $400 depending upon the office sought. Vt. Stat. Ann. tit. 17, § 2805. Because Act 64's expenditure and contribution limits apply on the basis of a two-year election cycle, the limits encompass expenditures and contributions for *both* a primary and general election. *Id.* §§ 2805, 2805a. These consolidated limits apply even where a candidate has a contested primary but his general election opponent does not. *Id.*

2. This case arises from three lawsuits challenging Act 64's constitutionality. Pet. App. 24a. The plaintiffs include a sitting Vermont state legislator, individuals who plan to seek Vermont political office, political parties and PACs, individual campaign contributors, and members of the Vermont electorate. Pet. App. 50a-51a. After a ten-day bench trial in 2000, the district court upheld many of the Act's challenged provisions, but enjoined enforcement of the expenditure limits as well as the limits on contributions from political parties. Pet. App. 24a-26a.

The district court's decision was appealed by all parties to the Second Circuit, which in August 2002 issued a 2-1 opinion sustaining almost all of Act 64's challenged provisions, including its expenditure limits. Pet. App. 95a. The court subsequently withdrew its opinion and then issued another 2-1 decision that again upheld most of the challenged provisions, while remanding the case for the district court to determine whether Act 64's expenditure limits are narrowly tailored. Pet. App. 96a-97a.

Although Vermont asserted five governmental interests in support of Act 64's expenditure limits, the Second Circuit considered only the first two: Vermont's purported interests in "avoiding the reality and appearance of corruption in elective politics and government" ("the anticorruption interest") and in "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties" ("the time-protection

interest"). Pet. App. 145a.[3] Contending that "the *perception* of corruption was an important part" of the anticorruption interest, Pet. App. 128a (emphasis in original), the court concluded that "Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending." Pet. App. 135a. The court nevertheless acknowledged this anticorruption interest was insufficient to sustain Act 64's expenditure limits because *Buckley* had "reject[ed] the anticorruption interest" in this regard. *Id.* The Second Circuit therefore expanded its inquiry to consider Vermont's time-protection interest. Noting that the "*Buckley* Court . . . alluded to this time-protection interest only in passing," Pet. App. 137a, the court deemed the time-protection interest to be compelling because "the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." The court opined that, "without spending limits, the contribution limits would exacerbate the time problem." Pet. App. 143a.

Notwithstanding *Buckley*'s invalidation of expenditure limits, the Second Circuit concluded that when the anticorruption and time-protection interests are "considered in tandem," they are "sufficiently compelling to support [Ver-

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[3] The five interests put forward by Vermont were:

(1) "avoiding the reality and appearance of corruption in elective politics and government";

(2) "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties";

(3) promoting "electoral competition" and "protecting equal access to political participation";

(4) "bolster[ing] voter interest and engagement in elective politics";

(5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Pet. App. 127a.

mont's] expenditure limits." Pet. App. 144a, 145a. Because the record was inadequate to determine whether the expenditure limits are narrowly tailored, however, the Second Circuit instructed the district court on remand to resolve "whether the legislature might have chosen . . . another type of regulation . . . that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters." Pet. App. 164a.

Turning to Act 64's contribution limits, the court concluded that these restrictions are compatible with the First Amendment because they are "closely drawn" to the anticorruption interest and comparable to "similar limits upheld in Maine and Missouri." Pet. App. 169a-170a. The court also upheld the constitutionality of Vermont's related expenditures provision, rejecting the argument that the provision is impermissibly vague and unduly restrictive of political parties' and PACs' activities. Pet. App. 181a-182a.

Judge Winter dissented from the panel majority's holding that Act 64's expenditure limits serve a compelling governmental interest and that the Act's restrictions on political parties are constitutional. Pet. App. 190a (Winter, J., dissenting). Emphasizing that "great caution is in order where incumbent legislators pass laws affecting their electoral fate," he was troubled by the panel majority's excessive deference to the Vermont legislature, which "exceed[ed] even that accorded to decisions of an administrative body." Pet. App. 206a-207a.

Judge Winter perceived that Act 64 "limits or prohibits a vast range of ordinary political activities," Pet. App. 191a, and identified the Act's adverse impact on grass-roots political activity (Pet. App. 228a), candidate speech (Pet. App. 233a), challengers (Pet. App. 245a), the press (Pet. App. 250a), and party affiliates (Pet. App. 253a). He further recognized that *Buckley* had conclusively foreclosed the use of the anticorruption interest to support expenditure limits, and

offered specific evidence from the *Buckley* record to demonstrate that the time-protection issue was also "fully before the Court in *Buckley*" and therefore had been rejected as a basis for imposing expenditure limits. Pet. App. 258a, 265a. Finally, Judge Winter objected to the narrow-tailoring remand because "vastly less restrictive alternatives"—including a system of combined public and private campaign funding—"are so obvious that a remand is unnecessary." Pet. App. 292a, 300a.

Plaintiffs petitioned for rehearing en banc, which the Second Circuit denied. *See Landell v. Sorrell*, 406 F.3d 159, 160 (2d Cir. 2005). The denial prompted four separate dissenting opinions, which were joined by a total of five judges. *Id.*[4] Three concurrences in the denial of rehearing en banc were also filed. *Id.* Notably, three of the seven judges concurring in the denial acknowledged that Act 64 is in tension with this Court's existing campaign finance precedent. *See id.* at 165, 167 (Sack and Katzmann, JJ., concurring in the denial of rehearing en banc); *id.* at 164 (Calabresi, J., concurring in the denial of rehearing en banc). Indeed, Judge Calabresi candidly acknowledged a desire to encourage this Court to revisit its holding in *Buckley* that an interest in equalizing electoral spending is not a sufficient basis for expenditure limits. *See id.* at 162, 165 (Calabresi, J., concurring in the denial of rehearing en banc) ("*Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. . . . I believe . . . a reconsideration [of *Buckley*] to be essential.").

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[4] Because Petitioners' Appendix was produced before the final amended version of the order denying rehearing en banc was filed, it does not contain Judge Calabresi's opinion concurring in the denial of rehearing or Judge Raggi's opinion dissenting from the denial. Pet. App. 317a.

SUMMARY OF ARGUMENT

Free speech is the essence of self-government, and thus all restrictions on political speech must be subject to searching judicial scrutiny. Act 64's expenditure and contribution limits silence the speech of both voters and candidates, and therefore cannot be reconciled with *Buckley* or with the First Amendment principles on which that decision rests.

The Second Circuit's conclusion that the anticorruption and time-protection interests taken together are sufficient to support Act 64's expenditure limits flatly contradicts *Buckley*'s holding. Indeed, Vermont's alleged time-protection problem is caused by its exceedingly low contribution limits, which require candidates to approach numerous small donors to raise essential campaign funds. Because Vermont's campaign finance restrictions have generated its perceived time-protection problem, the State cannot rely upon its interest in remedying that problem to justify its expenditures limits. Moreover, as in *Buckley*, Act 64's contribution limits and disclosure provisions more than fully address any legitimate anticorruption interest Vermont may have.

In upholding Act 64's expenditure limits, the Second Circuit *sub silentio* broadened the anticorruption interest to encompass the "equalization" rationale explicitly rejected in *Buckley*. This Court should reaffirm this aspect of *Buckley* because the compelled equalization of political speech is inconsistent with the First Amendment's fundamental commitment to free and robust debate on public issues. Whereas the First Amendment promotes a competitive and uninhibited marketplace of political ideas, Act 64 subordinates this principle in favor of a vague effort to equalize the quantity of political speech among various groups.

Furthermore, Vermont's campaign finance laws embody incumbent self-protection. Act 64 cannot withstand close judicial scrutiny because it accomplishes very little of what it claims and has the principal effect of benefiting incumbents.

For example, contrary to Vermont's assumption that Act 64's contribution limits reduce the access and influence of large donors, the Act actually has the opposite effect. The most efficient way to raise funds under the Act is for candidates to pursue only those donors willing to give the maximum authorized contribution, and thus to quickly reach the low expenditure limits, which marginalizes the majority of Vermont contributors.

Ultimately, Act 64's expenditure limits, contribution limits, and related-expenditure provision are incompatible with the fundamental political freedoms guaranteed by the First Amendment, and should be invalidated in their entirety.

ARGUMENT

I. ACT 64 IS BARRED BY THIS COURT'S HOLDING IN *BUCKLEY*.

The First Amendment embodies this Court's "profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Nowhere is this commitment stronger than in the realm of political speech, which constitutes "the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *Buckley* therefore cautioned that it "is wholly foreign to the First Amendment" to "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. Act 64's expenditure and contribution limits are squarely barred by *Buckley*'s admonition.

A. Act 64 Is Premised Upon Inappropriate Governmental Interests.

1. In *Buckley*, this Court considered a First Amendment challenge to provisions of the Federal Election Campaign Act ("FECA") that imposed unprecedented limitations on political contributions and expenditures. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). FECA prohibited individual campaign con-

tributions in excess of $1,000 per candidate and $25,000 overall, barred individuals from independently spending more than $1,000 on behalf of a candidate, and restricted the total amount a candidate could spend in primary and general election campaigns. *Buckley*, 424 U.S. at 7.

The United States asserted three governmental interests in support of FECA's campaign restrictions. *Buckley*, 424 U.S. at 25. The "primary interest" was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* The Court termed the other two interests "'ancillary' interests." *Id.* The first of these interests was "equalizing the relative ability of all citizens to affect the outcome of elections" by "mut[ing] the voices of affluent persons and groups in the election process." *Id.* at 25-26. The second was to "open the political system more widely to candidates without access to sources of large amounts of money" by curtailing the supposed "skyrocketing cost of political campaigns." *Id.* at 26.

The *Buckley* Court closely scrutinized FECA's campaign finance restrictions because the "governmental interests advanced in support of the Act involve[d] 'suppressing communication'" by "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Although the Court upheld FECA's $1,000 limitation on campaign contributions by individuals, it was careful to explain that it was not "address[ing] the more serious argument that these [contribution] limitations, in combination with the limitation on expenditures . . . invidiously discriminate against major-party challengers and minor-party candidates." *Id.* at 31 n.33. The Court expressed concern that "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge." *Id.* The Court further warned that "contribution restrictions could have a severe impact on political dialogue if

the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Turning to FECA's expenditure limits, the Court noted that such restrictions "impose direct and substantial restraints on the quantity of political speech" and "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 39, 44. The Court determined that the anticorruption interest was "inadequate" to justify the Act's $1,000 limitation on independent campaign expenditures because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 45-46. The Court then considered whether the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" supported the $1,000 expenditure limit. *Id.* at 48. The Court squarely rejected this "equalization" rationale and emphasized that "*the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.*" *Id.* at 48-49 (emphasis added). The Court therefore concluded that FECA's $1,000 independent campaign expenditures limitation violated the First Amendment. *Id.* at 51.

The Court also invalidated FECA's limitations on candidates' overall campaign expenditures. The Court explained that the anticorruption interest was already "served by . . . contribution limitations and disclosure provisions" and that "[i]n the free society ordained by our Constitution it is not the government but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 55, 57 (footnote omitted).

In the thirty years since *Buckley* was decided, this Court has held fast to the essential core of its holding, consistently evaluating campaign finance laws solely by their congruence with the government's anticorruption interest. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" (emphasis added)).

2. The Second Circuit relied upon Vermont's asserted anticorruption and time-protection interests to sustain Act 64's expenditure limitations. Pet. App. 144a. Analyzed in accordance with *Buckley*, however, the Second Circuit's attempt to bolster the anticorruption interest with Vermont's asserted time-protection interest collapses.

Vermont's time-protection interest is nothing more than a byproduct of its anticorruption interest. Indeed, if Vermont candidates do spend more than optimal amounts of time fundraising, then it is Act 64's low contribution limits that are to blame. Pet. App. 143a. In the absence of such stringent restrictions, candidates could raise necessary funds from a smaller number of donors. Because Vermont's purported time-protection problem is attributable to the contribution limits enacted in response to the State's anticorruption concerns, the time-protection interest cannot serve as an independent justification for restricting political speech.[5]

It defies logic and common sense to permit *Buckley*'s rejection of the anticorruption interest as a sufficient basis for expenditure limits to be circumvented through such legal

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[5] Instead of justifying even more speech restrictions, a time-protection problem actually indicates that contribution limits are set at unconstitutionally low levels. *See McConnell*, 540 U.S. at 135 (warning that contribution limits could be "so low as to 'preven[t] candidates . . . from amassing the resources necessary for effective advocacy'" (quoting *Buckley*, 424 U.S. at 21 (brackets in original))).

bootstrapping. *See* Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself out of a swamp by his own hair."). Vermont should not be permitted to rely upon its anticorruption interest to manufacture multiple derivative interests that, when aggregated, are ostensibly capable of supporting expenditure limits. *See* Pet. App. 336a (Jacobs, J., dissenting) ("[T]he more-restrictive expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the less-restrictive contribution limits. . . . Strict scrutiny does not tolerate such bootstrapping." (emphases omitted)).[6]

Moreover, to the extent that Act 64 actually reduces the time that candidates spend fundraising, it restricts constituents' access to their elected officials by limiting voters' opportunities to interact with candidates at fundraising events. Vermont's efforts to conserve candidates' time therefore constitute an impediment to voters' ability to meet and communicate with their elected officials.

B. The Court Should Reaffirm *Buckley*'s Rejection Of The "Equalization" Interest.

Act 64's expenditure and contribution limits make little sense when viewed as merely an attempt to prevent corruption or to conserve candidates' time. Indeed, these were not the only interests that the Act was designed to promote. The

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[6] As in *Buckley*, Vermont's anticorruption interest is more than sufficiently addressed by reasonable contribution limits combined with strict disclosure laws. *See* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [the Act's] campaign expenditure ceilings."). Indeed, Vermont presented "no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence." Pet. App. 266a (Winter, J., dissenting).

Second Circuit recognized that when drafting Act 64, "Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much campaign finance reform." Pet. App. 94a. In contravention of *Buckley*, Vermont lawmakers also sought to compel the equalization of political speech. *See, e.g.*, Pet. App. 130a (asserting that "[l]arge contributions and large expenditures . . . reduce public confidence in the electoral process" (quoting 1997 Vt. Laws P.A. 64 (H. 28) (finding No. 9))). Indeed, Vermont explicitly argued below that Act 64 "protect[s] equal access to political participation." Pet. App. 127a.

In upholding Act 64, the Second Circuit evaded *Buckley*'s rejection of the equalization rationale by *sub silentio* broadening the anticorruption interest to subsume the notion of equalization. *See, e.g.*, Pet. App. 133a (considering testimony that "not every voter has the financial ability to participate" as evidence of corruption). As Judge Winter correctly recognized, both Act 64 and the Second Circuit's opinion sustaining it are premised upon the theory "that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups." Pet. App. 279a (Winter, J., dissenting). This governmental interest in "equalizing" political speech through controlling campaign costs and restricting candidates' financial resources is a rationale that *Buckley* expressly considered and rejected.

Cutting away at the edges of *Buckley*'s equali tion holding, under the guise of preventing "corruption," muddles the Court's constitutional jurisprudence and "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 U.S. at 425 (citation omitted); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Buckley's holding is a fundamental reflection of our "profound national commitment to the principle" that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the "right of freely examining public characters and measures, and of free communication among the people thereon, [is] the only effectual guardian of every other right." James Madison, Report on the Virginia Resolutions (1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 146 (Philip B. Kurland & Ralph Lerner eds., 1987).

Vermont's expenditure limits operate on the assumption that "too much" political speech undermines citizen confidence in the government. The First Amendment, however, embodies the opposite premise. As Justice Breyer has recently explained:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 42 (2005). This principle has dominated our nation's understanding of political speech since its founding. *See* Madison, *supra*, at 145 ("The value and efficacy of [voting] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

Because political speech rests at the First Amendment's core, the government cannot forcibly equalize political speech by suppressing one group's speech in favor of another's. As this Court recognized in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution *it is not the government but the people . . . who must retain control over the quantity and range of debate* on public issues in a political campaign.

424 U.S. at 57 (emphasis added; footnote omitted).

The "equalization" rationale upon which Act 64 was premised undermines the protection historically afforded to political speech and cannot be reconciled with the First Amendment's role as guardian of the political marketplace. *See Buckley*, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."). Indeed, the First Amendment assumes a competitive marketplace of political ideas where "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Moreover, when the role of money is reduced, media access, fame or notoriety, and the advantages inherent in incumbency become even more dominant factors in deciding elections. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1078 (1996) ("attempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary, sources"). In fact, money often permits a challenger to overcome an incumbent's inherent advan-

tages. *See Buckley*, 424 U.S. at 56-57 ("the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign"). With expenditure limits in place, the already well-known, who can rely upon their preexisting name recognition, are often the only candidates able to mount an effective challenge to an incumbent. As Governor Schwarzenegger's electoral success in California suggests, publicly recognizable candidates may frequently enjoy a significant advantage over their opponents. When expenditure limits are implemented, the name recognition of challengers who are widely known to the electorate as war heroes, Hollywood movie stars, or superstar athletes gains even greater significance.

Similarly, by creating a system in which "free" media would be of potentially disproportionate significance, Vermont would ensure that free media's favored candidates have an unfair advantage. Vermont would bar a candidate from buying media access to counteract the unlimited sums that media corporations can spend to promote their favored candidate. *See* Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14 (observing that "one page of speech in USA Today could cost a private citizen, group, or candidate about $100,000").

Recognizing compelled equalization of political speech as an interest that trumps the First Amendment's protections opens the door to speech regulation that logically extends well beyond expenditure limits. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13. This may not disturb some advocates of campaign finance reform; one of Vermont's defense witnesses testified at trial that the "government ought to regulate political speech the way that it regulates public utilities." Pet. App. 195a (Winter, J., dissenting). Indeed, if the "equalization" rationale is to be effectuated, the government *must* regulate politi-

cal speech the way that it regulates public utilities. Equalization of political speech can only be achieved—to the extent that it can be achieved at all—through extensive regulation and direct governmental interference clearly inconsonant with the core principles underlying the First Amendment. This Court should therefore invalidate Vermont's effort to use expenditure and contribution limits to compel the equalization of political speech.

II. ACT 64 IS AN UNCONSTITUTIONAL IMPEDIMENT TO THE ELECTORAL PROCESS.

Because campaign finance restrictions present a unique potential for incumbent entrenchment, "considerable judicial suspicion" of such laws is appropriate. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994). Act 64's primary effect is to insulate incumbents from effective electoral challenges, and it therefore cannot withstand judicial scrutiny.

A. Act 64's Contribution And Expenditure Limits Entrench Incumbents.

1. Incumbents have a direct, personal stake in the election laws that they enact. *See* Sunstein, *supra*, at 1400 ("Any system of campaign finance limits raises the special spectre of governmental efforts to promote the interests of existing legislators."). It is difficult to conceive of any other area of law where the self-interest of all legislators, regardless of their party affiliation, is so uniformly aligned and so inconsistent with their constituents' interests. *See id.* ("Congressional support for [campaign finance] limits is especially likely to reflect congressional self-dealing. . . . Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks.").

Recognizing this, courts closely review campaign finance legislation to ensure that First Amendment principles

are not being subordinated to legislators' own interests. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (noting that the Court "defers to empirical legislative judgments" only where "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). This is especially true when legislators justify such laws on the basis of "equalizing" political speech; such a rationale is simply too far-reaching and amorphous to provide any meaningful restraint on naturally self-interested legislators. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994) ("[S]imply turning Congress loose to promote 'equality,' without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result."). As Justice Breyer has explained:

> [C]ourts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.

BREYER, *supra*, at 49.

The risk of incumbent self-dealing reinforces the importance of subjecting expenditure limits to the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. The Second Circuit, however, reviewed Act 64 with unwarranted deference, contending that the "review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the

reforms they are enacting." Pet. App. 151a; *see also* Pet. App. 207a (Winter, J., dissenting) ("I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny.").

2. Even assuming, *arguendo*, that Act 64's stated objectives are constitutionally legitimate, the Act does not accomplish its purported ends. Its expenditure limits, for example, do not further Vermont's anticorruption interest. *See Buckley*, 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). Nor does Act 64 ameliorate the time-protection problem it purports to address. Indeed, even the district court acknowledged as much. *See* Pet. App. 57a (noting that as a consequence of Act 64's low contribution limits, fundraising "will take more time and energy"). Similarly, Act 64's contribution limits are too low to correspond to any threat of actual or apparent corruption.

Act 64 is particularly effective, however, at promoting incumbency protection. This was obvious to the judges who dissented from the denial of rehearing en banc because they did not view Act 64 through the panel majority's deferential lens. Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Vermont's expenditure limits (and in my view, its contribution limits) are set so low and in such a fashion that *only* a desire to protect incumbents can explain them." (emphasis added)); Pet. App. 336a (Jacobs, J., dissenting from the denial of rehearing en banc) ("the dominant but impermissible effect of the Act is to protect incumbents").

Incumbents naturally possess formidable advantages over challengers. *See* Smith, *supra*, at 1075 n.158 ("Incumbency is already the single best predictor of electoral success."). As this Court noted in *Buckley*, "it is axiomatic that an incumbent usually begins the race with significant advantages." 424 U.S. at 31 n.33. If expenditures by challengers

can be limited to a level roughly equivalent to the average spent by all candidates, the advantages of incumbency become practically insurmountable. This is illustrated by the average amounts spent by winning candidates for national Congressional office in 2000 and 2002:

Average Spending By Winning Candidates - 2000[7]

	Senate	House
All	$7,506,743	$849,158
Challenger	$8,828,989	$2,024,725
Incumbent	$4,444,501	$782,460

Average Spending By Winning Candidates - 2002[8]

	Senate	House
All	$4,812,159	$898,184
Challenger	$6,826,395	$1,595,805
Incumbent	$4,681,870	$826,942

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[7] *See* OpenSecrets.org, The Big Picture, 2000 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2000 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2000 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2000 (last visited Nov. 17, 2005).

[8] *See* OpenSecrets.org, The Big Picture, 2002 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2002 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2002 (last visited Nov. 17, 2005). Although these figures from the 2000 and 2002 elections may be somewhat exaggerated by a few self-funding challengers with disproportionately high campaign expenditures, that cannot fully account for the significant difference between successful challengers' and successful incumbents' average expenditures. *See* OpenSecrets.org, The Big Picture, 2002 Cycle: Millionaire Candidates, *available at* http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002.

In both election cycles and both Houses of Congress, the average amount spent by winning *challengers* was significantly more than the average amount spent by winning *incumbents* and, consequently, more than the average amount spent by all winning candidates. Clearly, if incumbents wish to insulate themselves from effective challenges, they merely need to ensure that challengers are limited to spending no more than the historical average. This is exactly what Act 64 accomplishes.

Moreover, as Judge Jacobs noted, "[t]he Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest—which of course is more frequently a hurdle for challengers than for incumbents." Pet. App. 338a (Jacobs, J., dissenting from the denial of rehearing en banc). To challengers confronted with the nearly insurmountable advantages that Vermont's expenditure limits afford to incumbents—and to voters eager to be given a bona fide choice—the marginal 10-15% spending advantage offered by Act 64 provides little solace.

Act 64's exceptionally low contribution limits further serve to entrench incumbents because low contribution limits have their greatest impact upon challengers. Incumbents can rely on their name recognition, established donor lists, and free media. In contrast, challengers not only need more money overall, but they also usually rely on a small base of large donors until they become known by the voting public. Pet. App. 261a n.23. Act 64's expenditure and contribution limits hinder electoral challenges before they have a chance to gain momentum. *See Buckley*, 424 U.S. at 31 n.33 (noting that in some situations, "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). And without vigorously contested electoral races, voters cannot meaningfully exercise their right to participate in our republican form of government.

B. Expenditure Limits Reduce Political Accountability And Marginalize Ordinary Citizens.

The Second Circuit's opinion speaks repeatedly of "[e]vidence at trial [that] overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics." Pet. App. 129a. This "perception of corruption" is a persistent theme in Vermont's defense of Act 64. *See* Resp. & Part. Opp'n Pet. Writ Cert. at 7 ("All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.").

The argument fails on two levels. First, Vermont's contention that this concern demands governmental intervention inherently discounts the voting public's ability to address potential corruption through elections. Second, when coupled with contribution limits, expenditure limits actually increase the perception of so-called "big-money influence" on politics by drastically reducing the number of donors required to fund an election. If—as both the district court and Second Circuit suggested—the Vermont public is concerned that money buys influence, expenditure limits are likely to exacerbate such concerns. As the number of donors who contribute to a candidate decreases, the influence (or perceived influence) of any single donor increases.

The First Amendment empowers informed citizens—not elected officials—to decide whether to trust candidates and to vote accordingly. Vermont's assumption that it can restrict political speech in an effort to promote trust in elected officials runs directly counter to the principles of self-government embodied in the First Amendment. *See Buckley*, 424 U.S. at 57. Under Act 64, those candidates who are also elected officials decide how much their opponents are permitted to spend. Elections are usually fiercely competitive events, and—as with any competition—the competitor who

controls the rules has an enormous advantage over the other competitors.

Moreover, Act 64's expenditure limits rest on the premise that "public involvement decreases as spending increases." Pet. App. 278a (Winter, J., dissenting). This proposition is fundamentally flawed and belied by the fact that the most heavily contested elections often involve the most spending. Experience in Vermont bears this out. Record amounts were spent on Vermont's 2000 gubernatorial election in which several divisive issues were at stake; far from alienating voters, these expenditures actually captured voters' attention, resulting in 34.5% more people voting than in the prior gubernatorial election. Pet. App. 278a (Winter, J., dissenting).

Act 64's expenditure limits also ignore the *salutary* effects of fundraising activities. Indeed, fundraising events are not only a means of gathering contributions; they are also a mechanism through which candidates solicit votes and inform voters about their positions. Moreover, as this Court recognized in *Buckley*, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. Expenditure limits reduce the likelihood that the "size and intensity" of support for a particular candidate will be translated into political speech. Expenditure limits thus hurt those they are purportedly designed to protect—the voters. Government rationing of campaign spending inhibits voters' ability to perceive which ideas are widely held and resonate with a majority of the electorate.

In upholding the Act, the Second Circuit emphasized Vermont's belief that candidates tend to "expend[] more effort on relatively generous contributors over less important ones." Pet. App. 144a. Vermont assumes that expenditure limitations ensure "that candidates and officeholders will spend . . . more time interacting with voters." Pet. App. 127a

(alteration in original). In reality, expenditure limits actually encourage candidates and officeholders to spend *more* time interacting with *fewer* voters. If Act 64's assumption that money buys access is correct, the use of expenditure limits in conjunction with contribution limits actually increases the access and influence of "large" contributors ("large" meaning those capable of providing the maximum allowable contribution amount) at the expense of small contributors.

This result is attributable to the fact that the vast majority of campaign donors in Vermont historically have been "small" contributors. In the elections immediately preceding Act 64's passage, for example, between 82% and 96% of all contributions were below Act 64's limits. Pet. App. 39a-40a. In the aggregate, these "small" contributions likely represented a sizable portion of a candidate's total funds and therefore were valuable to the candidate, resulting in significant access for small contributors. With the imposition of expenditure limits, there are now more contributions available than a candidate can legally utilize. The most efficient way for a candidate to reach the fundraising limit is therefore to focus exclusively on comparatively "large" contributors. Thus, contrary to expectations, the combination of contribution and expenditure limits may actually eliminate the role of Vermont's small contributors and consolidate the influence of Vermont's largest campaign donors. There is accordingly a very real danger that large contributions "may eliminate the need for, and in that sense crowd out, smaller individual contributions." BREYER, *supra*, at 44.

Vermont also failed to consider that Act 64's particular combination of contribution and expenditure limits actually exacerbates the "specter of corruption" by radically reducing the number of contributors necessary or useful to any one candidate. Pet. App. 133a, 134a. Before Act 64, a candidate was likely to have many contributors, thereby spreading the candidate's funding among a broad group of donors. Act 64 inverts this tendency, consolidating the opportunity to con-

tribute (and, under Vermont's assumption, to influence) in the hands of a few. A candidate for state representative, for example, is likely to have as few as 10 contributors (10 contributors giving the $200 maximum contribution, which equals the $2,000 spending limit). Few candidates would opt to make hundreds of calls and attend dozens of public events if they could fully fund their campaign with 10 telephone calls. Act 64 therefore creates the very problem it was purportedly designed to resolve by "requir[ing] candidates to seek and rely on a smaller number of larger contributors . . . rather than a large number of small contributors." Pet. App. 131a (quoting 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5)).

Moreover, because Act 64 sharply reduces the number of contributors, it exaggerates the potential for (and appearance of) corruption from each contribution. The more donors that contribute to a campaign, the less financial influence any one donor can have on that candidate. The public perception of improper influence from any one donor is also diminished when that donor is merely one of many. Before Act 64, a $200 donor may have been the source of only a small percentage of a Vermont state representative candidate's overall contributions and likely was one of many contributors. After Act 64, the same donor will be assured of having given 10% of the candidate's campaign funds and may be one of only ten contributors.

In Federalist 10, James Madison recognized what has become a famous solution to our young republic's problem of factions (*i.e.*, special interests). Rather than attempting to remove the "causes of faction," which Madison deemed impossible without destroying the liberty "essential to political life," Madison suggested that broadening the electoral base would keep any one interest from dominating. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter rev. ed., 2003). This "republican remedy for the diseases most incident to republican government," *id.* at 79, reflects a

political understanding that is still celebrated in the "marketplace of ideas" conception of the First Amendment.

In the same way that our republic is moderated by competing political interests, competing monetary interests "encourag[e] the public participation and open discussion that the First Amendment itself presupposes" by "broaden[ing] the base of a candidate's meaningful financial support." *Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring). In the absence of expenditure limits, politicians are encouraged to reach out to more than a bare majority of their constituents and to avoid dismissing minority interests without careful consideration. Although a politician may need only 51% of the vote, fundraising considerations ensure that the interests of more than 51% of constituents will be considered. Politicians are encouraged to seek consensus solutions that satisfy more than a simple majority. Like Madison's solution to factions, the First Amendment's prohibition on expenditure limits ensures that elected officials are not concerned only with the interests of those who elected them.[9]

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[9] Act 64's presumption that spending by parties or PACs that benefits six or fewer candidates is a "related expenditure" similarly violates the First Amendment. The presumption discourages these organizations, which are now central to the political process, from engaging in independent political speech relating to a particular issue out of concern that the Act will automatically attribute the costs of their speech to a candidate. Similarly, these organizations will hesitate to speak in opposition to a candidate from fear that the cost of their speech will be automatically attributed to that candidate's opponent—or, at any rate, that the opponent will be put to the cost of demonstrating that it should not be so attributed, all against the backdrop of Act 64's very low expenditure limits. The First Amendment does not countenance such a chilling effect on political speech.

Even more perniciously, the combination of Act 64's coordinated-expenditure presumption and its expenditure limits could be used to effectively silence an opponent's campaign. A candidate's opponents could form PACs and use those PACs to run ads "supporting" the candidate on issues that have no importance to the electorate. Under Act 64's presump-

* * *

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). At best, Act 64 illegitimately subordinates this core principle of self-government in a misguided attempt to ameliorate political inequalities. At worst, Act 64 is a bald-faced example of incumbent protectionism. Either way, it cannot survive First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

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[Footnote continued from previous page]

tion, the cost of the PACs' ads would automatically count toward the candidate's expenditure limit. A candidate's permissible expenditures could thus be exhausted by his adversaries. The problem is made worse because expenses in challenging the presumption would also be attributed to the candidate's expenditure limit. Pet. App. 226a.

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IN THE
Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

Brief of Amicus Curiae ReclaimDemocracy.Org In Support of Respondents

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INTEREST OF AMICUS CURIAE

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Vermont residents.[1] The organization works to build a genuinely representative democracy based on the principle that citizens' ability to influence elections and government should result from the quality of their ideas and their energy and effectiveness in promoting them, independent of their financial status.

ReclaimDemocracy.org works to ensure we do not decay from a democratic republic to plutocracy. In its view, the constitutional promise of equal protection of the laws for all citizens requires we separate the opportunity to influence elections from wealth. Moreover, it maintains that the wealth discrimination of the current system results in de facto race and (to a lesser extent) gender discrimination, so "purging wealth discrimination from the electoral system is ... a civil rights issue." ReclaimDemocracy.org's work would be severely undermined were this Court to determine that the First Amendment bars states from protecting their citizens and the democratic process itself by limiting the influence of wealth on elections.

ReclaimDemocracy.org asks the Court to affirm the right of the citizens of Vermont and their legislature to place reasonable limits on campaign investments and spending in order to further the purposes of the equal protection mandate of the Fourteenth Amendment.

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[1] Letters of consent have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Vermont statute at issue in this case regulates monetary contributions to political campaigns and the amount candidates spend in order to assure Vermont's elections reflect the will of its citizens and the persuasiveness of candidates rather than the influence of domestic and foreign wealth.

Were it not for *Buckley v. Valeo*, 424 U.S. 1 (1976), Vermont's action would raise no substantial Constitutional issue. *Buckley*, however, equated money with speech and thereby introduced First Amendment principles of governmental abstention into campaign finance jurisprudence. By this misclassification, *Buckley* revived laissez-faire doctrines barring the government from protecting its citizens from the power of wealth. Its *Lochner*esque imposition of "the Social Statics of Mr. Herbert Spencer," see, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), creates an appearance of Constitutional conflict that has no basis.

Campaign contributions often are economic, marketplace transactions—purchases by individuals and business interests of "access" or "influence." Moreover, regardless of motivation, campaign contributions and candidate expenditures alike resemble economic activity far more than speech. Legislatures should be free to regulate them in order to protect our republican system of government from domination by wealth, just as they are free to create the rules for all other market transactions in order to harness the power of the market for the public good. *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938).[2] Free speech anti-

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[2] "Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis ...." Id.

censorship principles which preserve individual liberty against overreaching power have precisely the opposite effect when extended to create special privileges for the wealthy to dominate the electoral system.

All democracies must separate the realms of two different decision-making processes. First, a political arena of equal citizenship and political democracy, characterized by the fundamental principle of one person, one vote, *Reynolds v. Sims*, 377 U.S. 533 (1964). Second, a market arena of individual decision and regulation by price, where the anti-discrimination principle of equal access to markets co-exists with necessarily unequal wealth and economic power. Indeed, the separation of the spheres of market and law is basic to the rule of law itself: Both the Fourteenth Amendment and fundamental principles of justice dating back at least to Leviticus 19:15 teach that the law should favor neither rich nor poor.[3]

In our dual system, we allow money to buy most things, but never the political system that determines the limits to what money can buy. See, e.g., *Gordon v. Lance*, 403 U.S. 1, fn 1 (1971) ("a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective").

Vermont's statute limiting the influence of money on elections is an attempt to embody these basic norms in its electoral system in order to prevent democracy from degenerating into plutocracy. It seeks to protect the autonomy of the citizenry of Vermont and to ensure equal access to the electoral process, regardless of wealth, that has long been fundamental to this Court's jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

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[3] Cf. Exodus 23:6, Deuteronomy 1:17, 16:9.

prohibiting the free exercise of the franchise"); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional).

Moreover, like *Harper* itself, the Vermont statute recognizes that the wealth distribution in our country reflects racial divisions, so serious attempts to remedy racial wrongs also must confront the power of wealth. Each of these goals is presumptively valid under our Constitutional regime of republican democracy, and the legislature's choice of means is entitled to the usual deference granted to legislatively-enacted law.

Constitutional consideration of Vermont's attempt to protect its electoral system is distorted, however, by the lingering effects of *Buckley*. Neither Free Speech values, Equal Protection principles, nor the requirements of Due Process require that Vermont ignore the problems created for democracy when private wealth dominates the public electoral system.

The Court should take this opportunity to remedy the damage *Buckley* did to First Amendment, federalism and democratic values by rejecting this flawed precedent. Money is not speech. Applying doctrines designed to protect dissent and democracy to campaign finance has the perverse consequences of entrenching incumbents, unfairly enhancing the power of those individuals and corporations with the assets to purchase access to politicians, and, consequently, diminishing public faith in our institutions of government.

The Court should clarify that objections to the particular way Vermont has chosen to protect its republican form of government should be addressed to the people of Vermont and their elected representatives, not to this Court. Courts "are not free ... to reject [legislative] views about 'what constitutes wise economic or social policy,'" *Lyng v. UAW*, 485 U.S. 360 (1988).

ARGUMENT

I. *Buckley v. Valeo*'s Classification of Campaign Expenditures as First Amendment Speech Was Erroneous and Should Be Overruled

Buckley v. Valeo, 424 U.S. 1 (1976) revolutionized First Amendment and campaign finance law alike by holding that political money is "speech" for purposes of the First Amendment. Later cases have assumed the same analysis applies as against the state legislatures, via the Fourteenth Amendment's protections against violations of equal protection and due process of the laws.

But money is not speech. A regulatory regime appropriate to speech has perverse results when applied to money. After three decades of experience, the time has come to reexamine and reject *Buckley*.

First Amendment jurisprudence usually contains a strong presumption against governmental regulation, stemming from its core meaning as a ban on governmental censorship and governmental enforcement of religious and secular catechisms. *Buckley* transformed the traditional bar against censorship into something radically different: restrictive scrutiny of legislative action meant to protect the citizenry from abuse of the rights of property.

The First Amendment's protection against censorship is a critical element of our American system of republican self-government. First, the political freedom to criticize the incumbent officials is critical to majority rule: without it, government would be too free to manipulate, rather than respond to, public opinion. Open political debate is as foundational to democratic rule as elections. Second, we have long recognized free intellectual debate, cacophonous as it often is, as the only route to avoid the stagnation of vested

interests and to encourage intellectual progress. Third, the freedom to speak on all matters, even the purely artistic, creates a realm of privacy and personal freedom in which individuals can act without concern for the opinion of the majority, thus ensuring democracy does not degenerate into a tyranny of the majority.

Buckley, however, by simplistically substituting money for speech, promoted none of these values. Purchased speech often does not enhance political self-determination, truth-seeking intellectual inquiry or personal freedom.

A. *Buckley*, like *Lochner*, has privileged the privileged by sanctifying the current distribution of wealth

Buckley's equation of political money with speech repeats the infamous error of *Lochner*. In each case, the Court purported to derive an abstract principle from the Constitution's language. It then applied it without regard to context to cut off political debate over the difficult and controversial issue of how a democratic republic should manage its economy.

Lochner's invasion of the legislative sphere stemmed directly from its basic failing. The case assumed contractual agreements between bakers and their employers reflected the autonomous will of equal bargainers, and thus legislative imposition of terms was an invasion of the rights of both parties. This was a controversial view of contract then and remains one now. Others believed the very fact that bakers were willing to agree to work long hours in unsafe conditions was sufficient evidence that they had insufficient power to function as the autonomous beings the *Lochner* court imagined. *Lochner* was substantively wrong, first and foremost, because, by assuming equality when there was none, it further empowered the powerful at the expense of the weak. "Neutrally" enforcing agreements between bullies and their victims only worsens the position of the victims.

The *Buckley* framework suffers from a similar blindness to the realities of the world and a similar invasion of the legislative sphere with similar results: Reverse Robin Hood, it takes from the common person and gives to the rich. *Buckley* imposed a *Lochner*esque "free" market view on campaign regulation, in effect telling the people they and their elected representatives may not attempt to remedy the damage done to fair political competition by the distorting power of wealth. Like *Lochner*, *Buckley* wrongly interpreted the Constitution to protect a particular understanding of the rights of property, but not to protect more important rights—the true values of the First Amendment—from being subordinated to economic power.

Buckley mimicked *Lochner* in a third way. It made a major contribution to a political/economic complex that simply does not work on the ground, regardless of whether its particular conceptualization of the law can be made internally consistent. *Buckley* underpins the corruption and collapse of American politics much as *Lochner* helped lead to the collapse of our economy. The Great Depression demonstrated for many Americans that a market economy can succeed only if it involves and benefits a wide spectrum of citizens. *Buckley*'s imposition of *Lochner*esque "free markets" on elections has, similarly, led to the exclusion of most Americans from participation in and the benefits of democratic politics. This damages the legitimacy of and destabilizes our republican form of government. We should not wait for a political equivalent to the Great Depression before reversing course.

B. Property rights and the limits placed on the use of wealth to buy influence are matters of state law, not the First Amendment

The question of how best to define the rights of property and finance elections so as to protect citizens'

political rights and republican self-government is difficult and controversial. Many Americans today believe our representative democracy needs urgent repair. Campaign finance reform lies at the controversial core of that struggle precisely because it reflects multiple conflicting constitutional values.

Elections rely on the principles of "one person, one vote" and equal access to the ballot for their legitimacy. Similarly, the American conception of a republican form of government by "we the people" demands all citizens enjoy the equal protection of the laws and equal political rights regardless of wealth. See, e.g., *Harper*, 383 U.S. 663 (1966) (invalidating poll tax); *Bullock v. Carter*, 405 U.S. 134, 135 (1972) (invalidating ballot-access fees); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating ballot-access fee). The rights and responsibilities of citizenship, like the law and its protection, cannot be for sale.

Our market-based economy has inherent tendencies to inequality and to expanding the range of items that can be bought and sold. Determining and maintaining the boundary between the realms of market and politics is a central political question in our society. How much should the legal system counterbalance market tendencies to give more to those who already have more? When should the legal system modify the rules creating the market system to price goods—such as security, social stability, or clean air—that other market-based legal rules might not? What things or rights ought not to be for sale at all?

Campaign finance reform is at the core of the great debate over the proper place of the market in a democratic republic. Under our Constitutional system, government cannot be for sale, nor can politics be reduced to a marketplace. But even equal access to the ballot "does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *McConnell*

v. Federal Election Comm'n, 540 U.S. 93, 227 (2003). Instead, these are issues for legislative determination.

Advertising works, and more advertising than the competition generally works better. Otherwise, campaign finance would be of little interest. Of course, well-financed candidates sometimes lose, just as fine advertising campaigns cannot always make up for poor products. The Edsel has its political analogues. In general, however, participants in our campaign system assume voters, like consumers, often can be influenced or persuaded to act as marketers wish. Thus modern campaigns are about buying votes, even when *quid pro quo* bribery is not in the picture.

Because money matters, the equal protection principles of our republic are challenged deeply by any system allowing unfettered use of private resources to influence public political campaigns. Equal citizenship becomes meaningless when donors, not voters, become politicians' major constituents or when candidates can run for office only if backed by institutional or individual wealth.

The *Buckley* framework fails because it does not recognize, let alone confront, the central issues of campaign finance reform. The First Amendment bars censorship, both to preserve the freedom of citizens to dissent from the majority and to preserve the integrity of our political system by preventing any incumbent government from molding the citizenry into its supporters. But ours is a government of the people, not of the dollars. Our politicians should be responsive to citizens' opinions backed by their voting power, not to their wealth backed by their purchasing power.

Contrary to the implication of *Buckley*, our First Amendment nowhere states that wealth has a Constitutional claim to buy governmental access and influence. Instead, *Buckley*, like *Lochner*, simply imposed a discredited interpretation of "free markets" on an unwilling nation.

Freeing wealth does not free citizens. Ordinary citizens are not freer if wealthy individuals and institutions can dominate the public discourse or obtain privileged access to the corridors of power. On the contrary, the democratic system is deeply distorted. The distortion is only worsened by the fact that much of our wealth is corporate owned, controlled by fiduciaries who are required by state law and market pressure to use it for only limited purposes without regard to any citizen's view of the public good.

In the end, *Buckley*, like *Lochner*, failed because the complex and often fact-dependent issues of appropriate economic regulation cannot be resolved intelligently based on interpretation of abstract notions of free markets imposed by the Court on our Constitution. A First Amendment seeking "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), requires the rules of electoral competition be structured to open politics to all citizens. Instead, *Buckley* reduces most citizens' participation to choosing from a menu predetermined by those who hold the real power in elections today—organized interests comprised of large donors.

C. Speech and political regimes are radically different from market and economic regimes

Our collective decisions result largely from two radically different processes: politics and economics. Our politics are founded in a basic concept of equal citizenship, enshrined in the guarantees of the Fifth Amendment and Fourteenth Amendment of due process and equal protection and vindicated by this court in its voting rights cases. Most political decisions are made by the people's elected representatives, subject to limitations on the scope of collective decision-making designed to preserve a sphere of

private freedom.

The religion, speech and press clauses of our First Amendment protect both this sphere of personal autonomy and the democratic process by a common core principle: No censorship and no mind control. American concepts of freedom bar our government from coercing the citizenry to agree with or support the current powers-that-be, whether political or religious.

Freedom of speech is, in its core, a negative right—a bar on governmental action that, by its nature, lends itself to absolutes. This is particularly true in light of the Court's role in protecting the system and procedures of democracy even when temporary crises may make governmental officials, or even the population as a whole, think it expedient to sacrifice them in the name of security, stability or other important values.[4] As Jefferson put it, in condemning the Alien & Sedition Acts: "[L]ibels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."[5]

Economic decision-making is dramatically different

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[4] See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As the Court said in *Virginia v. Black*, 538 U.S. 343 (2003): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374, (1927) (Brandeis, J., concurring) (some internal citations omitted).

[5] 4 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 541 (1876), quoted in *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 157 (1973) (Douglas, J concurring).

from political decisions. Most importantly, economic decisions are made on the radically different basis of purchasing power. Additionally, collective economic decisions are made, at least in the first instance, by the market's aggregation of many individual decisions, with none of the collective debate, voting or reasoned principles that characterize political, bureaucratic and legal governmental decisions. As a result, under the right circumstances, market decision-making can be both more conducive to individual choice and more likely to lead to economic growth.

The line between democratic and market decision-making, however, must be drawn by the democratic process. Votes, not wealth, must remain the ultimate source of legitimacy in a democracy. Ours is a republic of people, not dollars, based on equality of citizenship, not equality of dollars.

Since at least the Great Depression we have recognized that one of the great tasks of government is to define the rules and limits of markets to ensure the "invisible hand" of the markets work for the good of all. The meaning of the "good of all," and the necessary compromises that must be made between sometimes-conflicting goals of economic growth, security, equality, decency and stability are often the central issues of politics. No constitution, and certainly not ours, which predates the modern economy, can remove such issues from ongoing political debate. The First Amendment model of governmental inaction is simply inapplicable.

D. Money can buy speech, but it is never speech itself

Citizenship is equal, but wealth is not. Indeed, the distribution of wealth in our society is extraordinarily unequal, with 1% of the population controlling approximately 40% of the total financial wealth of the

country in 2001, while half the population controls only 1% of the wealth.[6] If money is allowed to unduly influence votes, democracy descends into plutocracy.

The ability to speak and persuade is not, of course, equal and could not be in any decent society. But that inequality is limited by the range of human abilities. The inequality of audience is, in the ordinary marketplace of ideas, related to the persuasiveness of the speaker's ideas.

Purchased advertising is different. A candidate with sufficient funds can buy talent he or she lacks, buy attention that the candidate's ideas or eloquence would not command on their own merits, and multiply his or her presence beyond the possibilities of merely human abilities.

E. In its interpretation of the First Amendment, *Buckley* reverted to the discredited notion that the Constitution mandates laissez-faire economic policies

After the Great Depression and the demise of *Lochner*, Americans rejected the notion that government should, or even can, stand apart from economic affairs. Market-based capitalism requires an elaborate infrastructure of property, contract, anti-trust, anti-fraud, environmental protection and civil rights law, all of which are subject to the ordinary ebb and flow of political debate and legal change. Acknowledging this reality, the Court belatedly acknowledged it had exceeded the bounds of its legitimacy in preventing the political branches from debating the preeminent issue of democratic politics in a market economy. The New Deal "switch-in-time" acknowledged the issue of

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[6] Edward N. Wolff, *Working Paper No. 407: Changes in Household Wealth in the 1980s and 1990s in the U.S.* (2004) at 7 and Table 2. Financial wealth excludes owner-occupied housing and pension wealth and is therefore a reasonable proxy for wealth available for political purposes. Id. at 4. Income is less unequally distributed than wealth, but even so, the top 1% of families control about 20% of all income. Id. at 8.

how to structure the rules of property and market cannot be constitutionally ordained for all time—in part because property exists only within a constantly changing regulatory regime. Instead, the proper structuring of property rights is—legitimately—the subject of hard-fought political battles and necessarily temporary victories to be reexamined with changes in the economy and political mores.

Buckley's interpretation of the First Amendment to generally preclude explicit regulation of campaign-related economic activity—the direct and indirect purchase of advertising and similar media access—worked an inappropriate revival of *Lochner*. Constitutional principles require respect for the political process, see *Carolene Products*, 304 U.S. at fn. 4, just as they require respect for property rights. They do not require the State of Vermont to privilege further the already privileged by allowing the wealthy to purchase political access or influence not affordable to the rest of us. Nor do they sanctify property rules created for other purposes when they conflict with the needs of self-government.

No democracy can long survive if access to power can be bought. In an era in which special interests represented by K Street lobbyists are widely viewed as having influence on the national legislative process far beyond their voting strength, *Buckley* stands as a practical and ideological obstacle to this republic's self-preservation and self-definition.

II. Constitutional Bars on Campaign Finance Reform Do Not Promote First Amendment Values

"The First Amendment is a rule of substantive protection, not an artifice of categories." *Alexander v. U.S.*, 509 U.S. 544, 565 (1993) (Kennedy, J. dissenting). Vermont's law is not censorship and does not run afoul of

either of the two most important First Amendment values.

First, so long as campaign finance reform does not discriminate based on viewpoint or other improper bases, it does not restrict the sphere of privacy in which citizens may worship, study, think, write and express themselves as they see fit without legal requirement to consider the views of the majority or the last electoral victors.

Second, limitations on the amounts candidates may raise or spend do not, unless taken to an extreme, threaten the free political discourse which underpins any democratic or republican government. On the contrary, by freeing politicians from the necessity to adapt every statement to the needs of potential donors, expenditure limits allow politicians to debate more openly the good of the country or the desires of the marginal voter.

It is a matter of legislative judgment whether a political debate is more likely to be effectively held (1) under procedural campaign finance rules that ensure fair opportunities for all participants in a manner analogous to Robert's Rules of Order; (2) in a free-for-all governed primarily by property rules created for different contexts and the particular distribution of wealth and access to private means of publicity they create; or (3) by some other set of rules altogether. The First Amendment mandates government neutrality as to content and a governmental commitment to open debate, but not any particular form or style of debate. *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (upholding "time, place and manner" restrictions).

Many reformers believe that, ideally, a democratic society committed to equal citizenship and active political debate would provide open fora in which debate could take place—for example, by federal mandate that licensees of the public airwaves provide broadcast time to candidates without

charge. Others prefer to have candidates purchase broadcast access on the same terms as commercial advertisers, with or without state funding and with varying degrees of control over private funding. Still others, undoubtedly, believe preserving the power of the market is the most important value to be vindicated in setting campaign finance rules.

These debates, however, belong in our legislative branches because they are debates about how most effectively to govern, not about the meaning of the Constitution. The details of campaign finance reform require legislative judgments which should be left to legislatures except in extreme circumstances. The primary role for the Court is not to police restrictions on monetary expenditures under the guise that they are "speech." Instead, it should act to bar extreme legislative schemes that might violate the basic democratic values of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 337 U.S. 533 (1964), such as when a legislative scheme racially discriminates, or is designed to favor certain parties or incumbents to such an extent as to "unconstitutionally den[y a group] its chance to effectively influence the political process." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); cf., *Mobile v. Bolden*, 466 U.S. 55 (1980) (upholding multi-member districting scheme even against claim that at-large voting without proportional representation discriminates against minorities).

A. Unlimited campaign expenditures violate Fourteenth Amendment principles of political equality

Buckley conflicts with equality principles as well as democratic republican ones. The First Amendment applies to the State of Vermont only by virtue of the Fourteenth Amendment's promise of "due process" and "equal protection of the laws" to every citizen. Yet *Buckley* perpetuated precisely the opposite of political equality: an unfair, racially biased system in which political equality is

subordinated to the dramatic inequality of wealth in America.

The distribution of wealth in America is increasingly skewed.[7] Moreover, the small minority controlling the bulk of our wealth does not reflect the racial and ethnic diversity of our country. *Id.* Any policy which, like *Buckley*, protects and increases the privileges of wealth also, necessarily, slows the process of setting historic discrimination behind us.

Under the peculiar regime of *Buckley*, wealthy individuals and institutions (whether or not citizens) have a constitutionally protected interest in using their wealth to distort the equality principle in American elections. This is backwards. The Fourteenth Amendment's promise of political equality ought, instead, to mean states have the authority to restrain the rights of wealth to purchase ever-expanding power.

Although the Fourteenth Amendment bars our state governments from creating classes of citizens, *Buckley* requires states to provide extraordinary justification for measures designed to level the political playing field and provide equal access to the electoral machinery to all citizens. Rather than promoting equal protection of the laws, *Buckley* further privileged the already privileged.

B. Unrestrained campaign spending may tend to entrench incumbents, contrary to the First Amendment goal of encouraging self-government

The self-determination goal of the First Amendment is meant to protect our ability to control incumbent legislatures. *Buckley*, however, fostered an incumbent protection regime by limiting the extent to which legislatures can regulate political money.

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[7] See, e.g., EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA (1996).

Vermont could reasonably conclude that incumbents can raise money more easily than challengers because incumbents have more influence to sell to economically-driven donors who see contributions as profit-maximizing purchases of access to the regulatory regime.

1. Advertising displaces political discourse

Campaign expenditures buy advertising. Given the vast sums politicians and business corporations spend on advertising, a legislature reasonably could conclude advertising, in turn, affects campaign results independent of the underlying merits of the candidates. To be sure, Americans are not vending machines, responding mechanically when a coin is inserted. More spending does not guarantee election any more than it guarantees successful product launches. But American ingenuity has long relied on advertising to create positive images that may have little to do with underlying reality, to influence news coverage and to use people's semi-conscious desires to manipulate their behavior. This is a fine way to sell products, but a legislature is entitled to conclude that citizens determining the future of their country should debate in a context free of excessive manipulation.[8]

When money buys advertising, and advertising replaces actual political debate, First Amendment values suffer. Democracy is endangered when the techniques of Madison Avenue replace those of reasoned or impassioned debate. Advertising can overwhelm intelligent debate if even non-purchased debate begins to look like a Madison Avenue production, or the media cover political elections as if they

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[8] The importance of money in politics is increasing at a startling rate. Between 2000 and 2004, total spending in Congressional races increased by one-third. Gary Kalman & Adam Lioz, U.S. PIRG Education Fund, *Raising the Limits 2006* (Feb. 2006) at p. 23.

were referenda on the quality of the advertisements rather than candidate positions.

Political discourse does not exist in a vacuum. Rather, it is a continuing dialogue among citizens attempting to find a way to live together—expressing their common values and compromising or tolerating their differences. The influence of wealth and advertising distorts this process and makes it less likely to achieve a result that all citizens can live with.

2. Money can buy the appearance of credibility and thereby credibility itself

Significantly, this artificial, purchased, multiplication and dissemination of advertising is likely to create an aura of credibility that the candidate and the candidate's ideas may not be able to achieve on their own.

Popularity breeds popularity for rationally explicable and sound reasons. People frequently rely on other's judgments as a preliminary filter of what merits attention and a check on or confirmation of their own judgments. Widely distributed ideas, popular artists and successful celebrities have been seen and judged worthwhile by many independent viewers, editors or consumers, making it more probable that they are worth our attention. If we agree with the general view, other people's positive judgments confirm that our own were not mere lapses, while if we disagree, ordinary humility suggests that if many people have come to the contrary conclusion, perhaps we need to reconsider.

Advertising can distort this rational process by allowing a candidate with access to wealth to mimic success in this filtering contest without actually having to succeed. Money can buy the appearance of the level of support that makes a candidacy serious. It can buy the repetition that can make a specious charge or an extreme argument seem

plausible and ordinary. With enough funds, a candidate can buy a "bandwagon" that less-involved voters will see as worth joining simply because it exists.[9]

3. Candidate expenditure does not reflect preexisting support

Buckley appears to have assumed that fundraising is a proxy for popularity, depth of commitment among supporters or soundness of ideas. Were this assumption correct, advertising would be less likely to be a distortion of the electoral system and therefore less troubling: rather than substituting wealth for talent or experience, it would simply amplify existing difference in support.

Unfortunately, the assumption that spending reflects support is deeply implausible. Given our highly unequal wealth distribution, a modest contribution from an American citizen in the middle of our wealth distribution may indicate a stronger level of support than a far larger contribution from a wealthy person. The median net worth for the roughly 42 million households in the bottom 40% of Americans is $5000 including home equity. Some 338,000 households, in contrast, had net worth exceeding $10 million.[10] Several candidates in recent years have had even greater individual wealth. With this degree of disparity, Jesus' teaching about the widow's mite is truer than ever: small contributions from ordinary people often may reflect more support than large

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[9] See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11 (Daniel Kahneman et al. eds., 1982) (describing availability heuristic).

[10] Figures from Wolff (2004), supra n. 5, at table 2. Wolff's numbers are for 2001, using 1995 dollars. Wealth calculations are difficult and other methods generate somewhat different results. However, the details are not important; all observers agree that the American economy generates extraordinary wealth and distributes it extraordinarily unequally.

ones from the wealthy.[11] Reflecting this gap between support and ability to give, fewer than one-tenth of one percent of the voting age population gave $1000 or more to any congressional candidate in 2002. Yet funds from that tiny sliver of the public comprised the majority of all individual candidate contributions to those candidates.[12]

4. Business donors are purchasing services, not speaking

Many of the largest campaign contributions in our system are not statements of political positions at all. Rather, they are economically motivated investments—often from business corporations, their political action committees, or their employees—to advance the economic interests of their institutions. Investing in political decision-makers often is a highly effective way of increasing private profit: small changes in regulations, taxation or allocations can mean windfalls to particular companies or their competitors.

When donors are profit-maximizers or fiduciaries required by corporate law to set aside their political views of the good of the nation, contributions and related expenditures will flow in support of three types of politicians.

First, the rare, actively corrupt politicians who sell their influence. This Court has repeatedly recognized that the people have a compelling interest in barring this type of *quid pro quo* contribution. E.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). But *quid pro quo*

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[11] Mark 12:43-44, Luke 21:3-4. Modern economists refer to Jesus's insight as the "diminishing marginal utility of money": a dollar is worth far more to those who depend on it for basic necessities than for those who have more than they could ever spend.

[12] Adam Lioz, U.S. PIRG Education Fund, *The Role of Money in the 2002 Congressional Elections* (July 2003), p. 4.

contributions already are illegal and, presumably, most candidates have enough sense to avoid them.

The second option for profit-maximizing political investors is to fund politicians whose views generally favor the narrow economic interests of the donor. But most of the time, economic concerns of lobbyists are unlikely to be sufficiently salient to the general public (or candidates) to allow this type of maneuvering. The National Rifle Association or MoveOn.org can seek to fund candidates based on issues of concern to those groups, but most businesses cannot. Few candidates are likely to run on a platform openly favoring crony capitalism, pork barrel spending, corporate subsidies, or supporting an end to the environmental, securities, tort or civil rights laws that protect citizens' rights and direct the pursuit of private profit towards the public good. Moreover, some business managers are less likely to see their duty as promoting handouts to business *in general* than in finding the *particular* tax break, regulatory change or pork barrel project that will help the balance sheet of their particular firm. For that project, the candidate's general views are of little help.

This leaves a third, and quite disturbing, possibility. Businesses seeking to purchase political favors may fund candidates in the hope that implicitly—if not explicitly and illegally—the candidate will feel some obligation of reciprocity. Decent people, after all, typically return courtesies with courtesies and favors with favors without keeping exact track or using *quid pro quo* calculations. This is what is known in the industry as "buying access."

For a corporate executive, funding candidates who may be more sympathetic to the type of handouts or regulation that management believes will improve the firm's profits may well be good business, but it is not political participation that warrants First Amendment protection. The same is true of campaign contributions made to "buy access"

in order to allow a firm to lobby for legislative or regulatory details that will be invisible to the general debate.

The proper scope of regulation is a political issue that should be resolved by citizens and their representatives in response to political debate and voting power—not put up for auction to the highest bidder by politicians who view donors rather than voters as their key constituency. The businesses that are subjects of this debate ought not to control it—particularly when they, as in the case of our publicly traded corporations, are legally structured so as to bar them from considering the welfare of the system as a whole. Cronyism that is profitable for particular businesses in the short run may be destructive to our market system as a whole in the long run.

5. Expensive campaigns entrench incumbents, making them more able to raise the funds necessary to continue their entrenchment

Investor-donors interested in buying access or influence rationally will direct most of their money to incumbents, and especially to those incumbents able to influence economically-important legislation. Incumbents have more to sell.

The more expensive campaigning becomes, the more important this incumbent fundraising advantage becomes. In a self-reinforcing system, the greater the incumbent's advantage, the more likely the incumbent is to be re-elected and, consequently, the greater the influence the incumbent has to sell.[13] In short, money attracts money and thus further

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[13] In state races in the 2004 cycle, incumbents raised 58% of the total funds. Institute on Money in State Politics, *State Elections Overview 2004* (Dec 2005), p. 2, available at http://www.followthemoney.org/. The incumbents' advantage in Federal House and Senate raises was even more extreme: incumbents outspent challengers by 4.6 to 1 in 2004. Kalman & Lioz, *supra* n. 8, at p. 23.

distorts the system.

Buckley and its progeny have recognized the public's interest in eliminating both the actual purchase of political influence (corruption) and its appearance. But *Buckley*'s understanding of corruption is too limited. The First Amendment's guarantee of freedom of speech does not bar a state legislature from concluding that the detrimental effects of influence peddling extend well beyond *quid pro quo* corruption. Donors seeking to purchase political influence find legal ways of doing so; politicians seeking election or reelection fear the consequences of being outspent by a competitor; and as campaign expenditures spiral ever upward, politicians and donors alike find more creative ways to buy and sell access that should not be for sale.

First Amendment jurisprudence is based on the premise that unlimited speech promotes democratic government, by allowing criticism of incumbents and promoting discussion of alternative ideas. Unlimited campaign expenditures have the opposite effect: Incumbents are more able to raise large campaign chests because they are more likely to have the access and influence that most donors seek to purchase.

The need to attract wealthy donors reduces the ability of candidates to take positions in the public interest instead of their donors' and thus reduces the range and quality of candidate positions. Even when multiple viable candidates are able to raise the funds necessary to contend in our increasingly expensive campaigns, to raise the necessary funds they must share a fundamental commitment to appeasing donor interests. A state legislature is entitled to conclude that low voter turnout both reflects popular dissatisfaction with the status quo and is a problem that could be remedied by limiting the influence of wealth on campaigns.

Judge Winter's dissent below fails to recognize that, when selling access is the game, incumbents have an enormous advantage. The First Amendment's guarantee of free speech offers insufficient guidance to allow courts to displace legislative judgment as to the relative harm of "sale of access" or limits on buying name recognition through advertising. Nor would any free speech value be promoted by inventing a new constitutional right to purchase name recognition. When purchases, rather than speech, are the issue, *Buckley*'s metaphors of First Amendment abstention become *Lochner*'s unjustifiable enforcement of unfettered laissez-faire in the name of the Constitution.

CONCLUSION

Speech is not money. *Buckley* was wrong to impose a rigid First Amendment-based analysis on the complex problems of campaign finance reform. After thirty years, it is clear that *Buckley* followed the mistaken path of *Lochner*, imposing an artificial classification on the world without any basis in Constitutional text or values. For us to remain free, the "free market of ideas" must maintain its independence from the "economic market". The First Amendment, which applies to the states only by virtue of the Fourteenth Amendment's egalitarian commitment to equal protection and due process for all citizens, should not be distorted from a protector of democracy into the enforcer of a new plutocracy's grip on the political process.

This case involves less the First Amendment than the right of a state to attempt to further democracy and good government via economic regulation. Lochner's failure taught us that economic markets can be free if surrounded by politically-controversial legislation; campaign spending reform is precisely that kind of freedom-enhancing economic regulation. It should be analyzed under the fundamental Federalist principle that states create the rights of property

and their limits; under the Equal Protection principle that all citizens, whether rich or poor are entitled to have their vote given equal weight, and under the Republican Form of Government clause, *U.S. Constitution, Art. IV, § 4*, committing this nation to a government of the people, by the people and for the people—not of wealth, by wealth and for wealth.

In the absence of statutes like Vermont's Act 64, politicians must be inordinately concerned with the views of funders rather than voters. Moreover, successful fundraisers often avoid the spirit if not the letter of campaign finance regulations, leading to a general aura of sleaze. One consequence is that the *Buckley* framework gives independently wealthy politicians a double-edged advantage: they can outspend their opponents while maintaining the independence that used to mark statesmen when campaigns were cheaper. Unlimited campaign spending, far from preserving First Amendment values, corrupts our electoral process.

The Court should take this opportunity to disavow *Buckley* and uphold Vermont Act 64 under its ordinary voting rights jurisprudence.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

WILLIAM H. SORRELL, *et al.*,
Conditional Cross-Petitioners,
v.
NEIL RANDALL, *et al.*,
Conditional Cross-Petition Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND CONDITIONAL CROSS-PETITION RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that participates extensively in national, state, and local elections.[1] The RNC is subject to and complies with applicable rules imposed by the federal and state governments, including Vermont. The RNC has in the past and will in the future support candidates who are subject to the provisions of Vermont's Act 64.

SUMMARY OF ARGUMENT

1. Act 64's presumption that political party independent expenditures primarily benefiting six or fewer candidates are coordinated with those candidates offends the First Amendment for the reasons set forth in *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado I*"). In *Colorado I*, the Court struck down a presumption that political party independent expenditures were coordinated with candidates because such a blanket presumption itself infringes speech, and independent expenditures present no prospect of corrupting the benefited candidate. Moreover, Act 64's presumption offends the Due Process Clause because it reverses the burden of persuasion in a way that punishes speech, sets forth no definitive mechanism for challenging the application of the presumption to a particular expenditure, and fails to guarantee a prompt resolution of any such challenge so that the speech can proceed.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

2. Act 64's scheme of expenditure limitations violates the First Amendment by imposing "direct and substantial restraints on the quantity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The proffered justifications for Act 64 do not withstand strict scrutiny. As explained in *Buckley*, 424 U. S. at 45-46, 47-48, expenditure limits do not correlate to any anti-corruption purpose. Moreover, the asserted interest in protecting the time of incumbent politicians is neither compelling nor related to the imposition of expenditure limits, since much if not most political fundraising by such means as direct mail and the Internet is done with little personal involvement of the candidate, the expenditure limits do not ensure that officeholders will devote more time to their official responsibilities (as opposed to other campaign activities), and the expenditure limits enhance the powers of incumbency. Finally, the expenditure limits are neither narrowly tailored to advance the asserted state interests, nor are they the least restrictive means for doing so, since Vermont has not, unlike many other states, enacted legislation that prohibits fundraising while the legislature is in session. Finally, the suggestion that this Court revisit its precedents holding expenditure limitations offensive to the First Amendment fails to satisfy the threshold requirements for overruling settled precedent.

ARGUMENT

I. ACT 64'S PRESUMPTION OF COORDINATION VIOLATES THE FIRST AMENDMENT AND DUE PROCESS CLAUSE.

Act 64 provides that independent expenditures made by a political party "that primarily benefit[] six or fewer candidates" associated with that party are presumed to be coordinated expenditures on behalf of those candidates. VT. STAT. ANN. tit. 17, § 2809(d). Any coordinated expenditure,

in turn, is deemed to be "a contribution to the candidate on whose behalf it was made," VT. STAT. ANN. tit. 17, § 2809(a), and is subject to the applicable limit for contributions to that candidate. *See* VT. STAT. ANN. tit. 17, § 2809(a).[2] The Act defines "expenditure" broadly to encompass any spending "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." VT. STAT. ANN. tit. 17, § 2801(3). Thus, an "independent expenditure" under Act 64 is a very broad and vague concept.[3]

The text of Act 64 does not state whether this presumption of coordination is conclusive or rebuttable, but administrative guidance promulgated by Vermont's secretary of state suggests that the presumption is rebuttable. *See* Guide to Vermont's Campaign Finance Law 30 (November 2005) *available at* http://vermont-elections.org/elections1/2005_cf_guide_1118.htm ("When an expenditure is presumed to be a related expenditure, the presumption can be overcome by evidence that the elements of the definition in section 2809(c) were not met.").

Although Act 64 does provide that a *candidate* may bring an expedited court action to declare that expenditures made

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[2] Violations of Act 64's contribution limits through independent expenditures deemed to be coordinated expenditures appear to be civil, as opposed to criminal offenses. *See* VT. STAT. ANN. tit. 17, § 2806(b) (providing for a civil penalty of up to $10,000 for each violation of Act 64). A $10,000 civil penalty is very substantial: it is more than 3-percent of the expenditure limit for candidates for Governor; 10-percent for Lieutenant Governor; and 22-percent for certain executive branch offices. The penalty exhausts the spending limits for State Senate, county office, and State Representative.

[3] The RNC contends that the definition of "expenditure" is grossly overbroad in numerous respects, but this issue is not currently before the Court.

on behalf of an *opposing* candidate are coordinated, *see* VT. STAT. ANN. tit. 17, § 2809(e), neither the Act nor administrative guidance provides a similar judicial or administrative mechanism for a *political party* making such expenditures to bring a court action or administrative proceeding to rebut the presumption. Indeed, the enumeration of one mechanism for seeking review under 2809(e) suggests that other modes of review are prohibited. *See In re 1650 Cases of Seized Liquor*, 721 A.2d 100, 106 (Vt. 1998) (applying *expressio unius* canon of construction to Vermont statute).

A. Independent Expenditures Are Fully Protected By the First Amendment.

This Court has twice reviewed restrictions on political party independent expenditures and both times has held them unconstitutional. In *Colorado I*, 518 U.S. at 617-18, the Court ruled that an expenditure by the Colorado Republican Party was constitutionally protected, and rejected the argument that political parties have a lesser right to make independent expenditures than other speakers: "We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 618 (principal opinion by Breyer, J.). The Court was unpersuaded by the FEC's presumption that, "as a matter of law," party expenditures are coordinated with candidates, writing "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

More recently, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 213-19 (2003), the Court unanimously struck down section 213 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 94, which

required political parties to elect between making coordinated expenditures and independent expenditures. Again, the Court emphasized that political party independent expenditures are "plainly . . . entitled to First Amendment protection," and that no "meaningful purpose" was served by restricting such expenditures. *McConnell*, 540 U.S. at 217-18.

B. Act 64's Related Expenditure Provision Will Severely Restrict or Eliminate Independent Expenditures by Political Party Committees.

Section 2809(d) was intended to and does encompass the vast majority of political party independent expenditures. Any independent expenditure criticizing a candidate would presumably benefit only that candidate's opponent, and would fall within the presumption. Any independent expenditure praising a single candidate would fall within the presumption. Indeed, it is unusual for an independent expenditure to "benefit" more than one candidate, meaning that the presumption will swallow the bulk of independent party spending.[4]

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[4] Judicial decisions addressing particular independent expenditures confirm this point. *See e.g., Colorado I*, 518 U.S. at 608 (concerning independent expenditures by a political party committee for advertisements about U.S. Senate candidate Timothy Wirth); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 483 (1985) ("*NCPAC*") (concerning independent expenditures by political action committees in support of President Ronald Reagan); *Federal Election Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (concerning independent expenditures by a non-profit organization for advertisements opposing Speaker of the House Newt Gingrich); *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987) (concerning independent expenditures by an advertiser opposing President Jimmy Carter); *Federal Election Comm'n v. Cal. Democratic Party*, No. Civ. S-03-0547 FCD DAD, 2004 U.S. Dist.

(continued...)

Moreover, section 2809(a) imputes independent expenditures by political parties to candidate committees, counting them not only as "contributions" to the beneficiary candidate, and thus subjecting them to the draconian contribution limits, but presumably also against that candidate's spending limit. This provision is patently unfair to candidates because independent expenditures – which by definition the candidate does not control or even know are coming – may deplete candidate spending allowances. Consequently, political party committees will be deterred from making any independent expenditures because their activities may preempt the favored candidate's ability to communicate directly with voters. Plainly, such deterrence was the very purpose of the provision.[5]

C. The First Amendment Does Not Permit the Government To Presume that Speech Is Unprotected Until the Speaker Rebuts the Presumption.

Section 2809(d) creates the same type of "presumption of coordination" that this Court found improper in *Colorado I*,

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LEXIS 7269, at *3-*5 (E.D. Cal. 2004) (concerning independent expenditures by a political party committee in support of Congresswoman Lois Capps).

[5] According to the district court below, the restraint on independent expenditures in section 2809 "was designed to plug a loophole that would have allowed for circumvention of Act 64's individual contribution limits." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490 (D. Vt. 2000). The restriction would prevent political candidates from evading campaign finance restrictions "by asking others to collect and spend money for them." *Id.* This is an argument for regulating *coordinated expenditures*, however, not independent expenditures, which involve no prior communication between the political party and the candidate's campaign.

518 U.S. at 622. As the Court explained, "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Under *Colorado I*, section 2809(d) must fail.

The lower court attempted to distinguish *Colorado I* on the ground that the presumption of coordination in that case was "conclusive," whereas the presumption in section 2809(d) is ostensibly rebuttable, through as yet unspecified procedures. *See Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004). This is no distinction at all; as did the presumption in *Colorado I*, section 2809(d) plainly places a severe burden on independent speech for no valid reason. The time, effort, and expense necessary to rebut the presumption is a burden on speech, especially in the fast moving context of a political campaign. The result will be little if any independent party spending. No government interest has been advanced to justify this suppression of speech.[6]

Further, the government may not simply presume speech unprotected until the putative speaker rebuts the presumption. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (the burden of proving that speech is unprotected "must rest on the censor"); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("In practical operation, therefore, this procedural device [a statutory presumption that speech is unprotected] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.").

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[6] In what appears to be the only reason for the presumption, Vermont State Representative Terry Bouricius, who is the sponsor of the legislation, asserted that expenditures supporting six or fewer candidates were "more likely to be part of [a] campaign." *Landell*, 118 F. Supp. 2d at 492 n.28.

The net effect of section 2809(d) is to restrict speech unless and until the party obtains a ruling, if such a ruling is even allowable, that the speech is *not* coordinated. In this manner, the presumption creates a prior restraint of speech that is impermissible under the First Amendment. *See Freedman*, 380 U.S. at 59-60 (Maryland statute requiring license for motion picture displays was an impermissible prior restraint because it, *inter alia*, placed on exhibitor the burden of persuasion that the film was protected expression). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 124-25 (D.C. Cir. 1977) (FCC regulation establishing rebuttable presumption that certain speech was unprotected was impermissible prior restraint).

D. Act 64's Presumption of Coordination Violates Due Process.

1. Act 64's Presumption of Coordination Violates Due Process By Shifting the Burden of Persuasion.

Even if establishing the presumption did not so plainly offend the First Amendment, and even if there were a realistic mechanism of review, section 2809(d) would be infirm as a denial of Due Process. By imposing a mandatory rebuttable presumption that a political party's independent expenditures are coordinated, Act 64 shifts the burden of persuasion to a political party. *See Francis v. Franklin*, 471 U.S. 307, 317 (1985) ("A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding."); *see also County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979)

(mandatory presumption "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts").

Under the Due Process Clause, a state may not impose a mandatory presumption in criminal cases, even if rebuttable, because it has the impermissible effect of shifting the burden of persuasion. *See Francis*, 471 U.S. at 317 ("A mandatory rebuttable presumption is perhaps less onerous [than a conclusive presumption] from the defendant's perspective, but it is no less unconstitutional. Our cases make clear [such] shifting of the burden of persuasion . . . is impermissible under the Due Process Clause.").

This same heightened Due Process scrutiny applies to presumptions under civil statutes involving "affirmative Government action which seriously curtails important liberties cognizable under the Constitution." *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975). Just as the government has the burden of persuasion in criminal cases, the First Amendment places on the government the burden of persuasion to show that speech is unprotected. *See Freedman*, 380 U.S. at 58. More specifically, in the context of independent expenditures, the government has the burden of persuasion that such expenditures are coordinated and thus subject to contribution limits. *See Colorado I*, 518 U.S. at 616.

Accordingly, section 2809(d)'s mandatory rebuttable presumption violates Due Process by shifting the burden of persuasion to political parties to prove that their independent expenditures are not coordinated. *See Speiser*, 357 U.S. at 526 ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct

enactment. The power to create presumptions is not a means of escape from constitutional restrictions.") (citing *Bailey v. Alabama*, 219 U.S. 219, 239 (1911)).

2. Act 64 Fails To Provide Adequate Procedural Safeguards to Allow for the Prompt Rebutting of the Presumption.

Act 64's related expenditure provision fails to provide adequate procedural safeguards for political parties. Although Vermont's secretary of state asserts in administrative guidance that the presumption of coordination is rebuttable, neither the statute nor the secretary of state's administrative guidance identifies any process by which a political party might rebut this presumption and obtain approval for the independent expenditure. The absence of a clear process for timely rebutting the presumption is an independent First Amendment violation. *See Freedman*, 380 U.S. at 60 (Maryland statute barring exhibition of motion pictures until exhibitor proved the speech was protected was invalid under the First Amendment because, *inter alia*, the statute provided "no assurance of prompt judicial determination").

The very uncertainty of any available procedure for securing prompt judicial or administrative review of the presumption will chill protected speech. As this Court has explained, "[a] scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS, Inc., dba Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 227 (1990). "Until a judicial decree to the contrary," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), Act 64's presumption stands. "In the interim, opportunities for speech are irretrievably lost." *Id.*

In the context of *political* speech in the heat of an election, delays caused by procedural deficiencies are constitutionally intolerable. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *see also Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (a delay "of even a day or two" may be intolerable when applied to 'political' speech in which the element of timeliness may be important").

II. VERMONT'S EXPENDITURE LIMITATIONS VIOLATE THE FIRST AMENDMENT.

At least since *Buckley*, it has been clear that campaign expenditure limits violate the First Amendment because they "impose direct and substantial restraints on the quantity of political speech." 424 U.S. at 39. The reasons for this holding are as obvious today as they were 30 years ago: First, money enables speech, and more money enables more speech. Second, under a regime of contribution limits, greater expenditures necessarily imply a larger and broader base of financial support, reducing rather than increasing the reality or the appearance of *quid pro quo* corruption. Third, expenditure limits necessarily fall disproportionately on non-incumbents, who lack the profile and name recognition of incumbents.

This Court has repeatedly reaffirmed *Buckley's* holding that expenditure limits restrict core political speech and thus offend the First Amendment in the most fundamental way. *See, e.g., McConnell*, 540 U.S. at 120 (*Buckley* "treated the limitations on candidate and individual expenditures as direct restraints on speech"); *Federal Election Comm'n v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 437

(2001) ("*Colorado II*") ("Later cases have respected this line between contributing and spending."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) ("[A]n expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents.'") (citing *Buckley*, 424 U.S. at 22); *Colorado I*, 518 U.S. at 610, 614-15; *Federal Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *NCPAC*, 470 U.S. at 491. The legislative history of Act 64 makes plain that it was intended to be, and is in fact, a direct assault on this settled and sensible precedent. *See* Memorandum from Vt. Sec'y of State Deborah L. Markowitz to the S. Gov't Operations Comm. and H. Local Gov't Comm. (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001gamemocf.html.[7]

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[7] This Court's decisions applying the doctrine of *stare decisis* argue strongly against overturning the holding in *Buckley*, 424 U.S. at 143. First, *Buckley's* holding that expenditures are constitutionally protected established an important liberty interest, and political parties, candidates, and other participants in the political system have acted with reliance on that holding for the last 30 years. *Cf. Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[W]hen a Court is asked to overrule a precedent *recognizing* a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.") (emphasis added). Second, *Buckley's* holding that expenditures are constitutionally protected has been repeatedly reaffirmed by this Court, and has caused no uncertainty or instability in the law. *Cf. id.* (consideration weighing in favor of overturning prior decision is if the prior decision "itself causes uncertainty, [because] the precedents before and after its issuance contradict its central holding"). Third, as explained in text, *Buckley's* rationale with respect to the constitutional protection afforded expenditures was entirely correct. *Cf. id.* (consideration weighing in favor of overturning prior decision was that its rationale did not "withstand careful analysis").

A. Expenditure Limits Are Subject to Strict Scrutiny Because They Severely Burden Core Political Speech.

Political speech lies at "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," expenditure limitations constitute "substantial rather than mere theoretical restraints on the quantity and diversity of speech." *Id.* at 19. Applying "exacting" constitutional scrutiny, *id.* at 44-45, the *Buckley* Court struck down all the expenditure limits that were before it: campaign expenditure limits, *id.* at 55-56; limits on independent expenditures by individuals and groups, *id.* at 45-48; and limits on expenditures by a candidate of his own money, *id.* at 53. In subsequent decisions, the Court struck down limits on independent expenditures by political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01, and on independent expenditures by political parties, *Colorado I*, 518 U.S. at 617-18 (principal opinion by Breyer, J.). Since *Buckley*, neither this Court, nor any circuit court until the one below, has upheld a ceiling on political expenditures. In view of this consistent precedent, it is striking that the lower court failed to explain why departure from it is warranted.

These decisions have applied strict scrutiny, requiring a showing of "a sufficiently strong governmental interest" served by the restriction and a showing that the restriction is "narrowly tailored to the evil that may legitimately be regulated." *NCPAC*, 470 U.S. at 496. *See also Mass. Citizens for Life*, 429 U.S. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."); *McConnell*, 540 U.S. at 135-36 (distinguishing contribution limits from expenditure limits because the latter "'preclud[e] most

associations from effectively amplifying the voice of their adherents'") (internal citations omitted); *Shrink*, 529 U.S. at 386-88 (emphasizing that restrictions on expenditures are "direct restraints on speech," subject to more rigorous scrutiny than contribution limits). The expenditure limits at issue here cannot survive strict scrutiny.

B. Act 64's Expenditure Limits on Candidates Are Not Supported by Valid Governmental Interests.

In the thirty years since this Court decided *Buckley*, the Court has identified *only one* compelling interest that can justify campaign finance restrictions: the prevention of actual and apparent corruption in the electoral process. *See NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."). *See also McConnell*, 540 U.S. at 142 ("Congress enacted § 323 as an integrated whole to vindicate the Government's important interest in preventing corruption and the appearance of corruption.").

Buckley explicitly rejected various justifications offered in defense of spending limits. For example, it held that leveling the playing field to provide equivalent opportunities to candidates "is wholly foreign to the First Amendment." 424 U.S. at 48-49. It considered and rejected concerns about rising campaign costs because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57.[8] So sound are these repudiations that the

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[8] *Compare Buckley*, 424 U.S. at 57 ("Appellees and the Court of Appeals stressed statistics indicating that spending for federal election (continued...)

lower court did not rely on these justifications in upholding the spending limits here.

Rather, the lower court upheld the restraints based upon a purported desire to prevent corruption and a desire to save incumbent legislators time from fundraising. Neither justification withstands analysis.

1. A Legislative Desire to Prevent Actual or Apparent Corruption Cannot Excuse *Expenditure* Limits.

In 1997, the Vermont legislature enacted Act 64 specifically to challenge this Court's holding in *Buckley* rejecting expenditure limitations. *See* Markowitz Memorandum (Jan. 9, 2001); *see also Landell*, 382 F.3d at 185 (Winter, J., dissenting). Because neither Vermont nor the lower court have identified anything in the American political process – much less in the First Amendment – that has materially changed in the last 30 years, the RNC respectfully urges this Court to reaffirm that the First Amendment proscribes expenditure limits.[9]

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campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period."), *with Landell*, 382 F.3d at 101 (citing findings by the Vermont General Assembly that: (1) election campaigns for statewide and state legislative offices are becoming too expensive; and (2) citizen interest, participation, and confidence in the electoral process is lessened by excessively long and expensive campaigns).

[9] Passage of Act 64 in Vermont appears less the result of any overriding public concern with corruption than a desire by a majority of Vermont's legislature to challenge the settled precedent barring spending limits.

This Court has repeatedly rejected the anti-corruption interest as a valid justification for expenditure limitations. In *Buckley*, this Court held this interest was *not* sufficient to justify the Act's limits on independent expenditures, 424 U.S. at 45-48, expenditures derived from a candidate's personal funds, *id.* at 53, and overall candidate expenditures. *Id.* at 55-56. Since *Buckley*, the Court has similarly held that the anti-corruption interest does not justify limits on independent political expenditures by political parties, *Colorado I*, 518 U.S. at 617-618 (principal opinion by Breyer, J.), and political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01.

The reason is simple. Limits on political expenditures directly limit political speech. Yet, under a regime of contribution limits, *more* money raised *lessens* the influence of each contributor. Further, once money is raised in compliance with contribution limits, the act of spending the money – on handbills, candidate appearances, or media advertising – has no actual or apparent corrupting potential.

This Court has defined corruption as "a subversion of the political process." *NCPAC*, 470 U.S. at 497. "Elected officials are influenced to act contrary to their obligations of office *by the prospect of financial gain* to themselves or infusions of money into their campaigns." *Id.* (emphasis added). Actual or apparent corruption (including undue contributor influence) in the realm of campaign finance exists primarily, if not exclusively, in transactions involving contributions, whether directly to a candidate, *see Buckley*, 424 U.S. at 25-29, or to a party committee at the behest of, or with the knowledge of, a candidate of that party. *McConnell*, 540 U.S. at 145-54. Thus, in this Court's decisions a political contribution to a candidate or a political party may give rise to the appearance of an unlawful exchange or undue influence, but a payment by a candidate

to a vendor, for example, will not. No *quid pro quo*, appearance of a *quid pro quo*, or appearance of undue influence occurs when a candidate merely spends money that has been legally raised.

It is noteworthy that there is no record in this case supporting the theory that expenditure limits are necessary to curtail corruption or the appearance of corruption in Vermont elections. Despite findings of voter apathy and frustration about costly campaigns – concerns not bearing directly upon the issue of corruptive influences in politics – proponents of Vermont's expenditure limits have been unable to identify ways in which unlimited campaign expenditures give rise to the appearance of corruption.[10] Rather, they have hypothesized about corruption caused by large campaign *contributions*.

In this case, even the lower court has acknowledged that, based upon the *Buckley* opinion, the anti-corruption interest, standing alone, is insufficient to justify the limitations on candidate campaign expenditures that were enacted by the Vermont legislature. *See Landell*, 382 F.3d at 119. This Court should reaffirm *Buckley*'s holding that expenditure limits do not deter corruption or the appearance of corruption. That holding was correct then, and it is still correct today.

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[10] *See generally Landell*, 118 F. Supp. 2d at 465-474; *see also Landell*, 382 F.3d at 189-91 (Winter, J., dissenting) ("The only particularized evidence of improper influence relied upon by my colleagues consists of one anecdote. It involved 'widely reported' meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations, Maj. Op. at 50. We are asked to assume in this case that unspecified *contributions* – in contrast to, perhaps, numbers of voters involved – were the decisive factor.") (emphasis added).

2. Incumbent "Time-Protection" Is Not a Valid Governmental Interest.

The Vermont legislature asserts a compelling government interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties." *Landell*, 382 F.3d at 115. The lower court recognized that this interest, alone, would be insufficient to support curbs on political expression, *see id.* at 125; it nevertheless ruled that the so-called "time protection interest" coupled with the anti-corruption interest, are sufficiently compelling reasons to excuse candidate expenditure limits. *See id.*

The premise of the time-protection interest is that an incumbent politician will be set free from the shackles of fundraising responsibilities if cost controls are implemented on the campaigns of the incumbent and his challengers.[11] By liberating the incumbent from the time-consuming burden of raising unlimited sums to funding for a successful re-election, the incumbent will be able to devote his bonus hours to "important government business" that may include "studying legislative proposals or meeting with constituents who may not be likely donors." *Id.* at 123.

The flaws in this reasoning are too numerous to compile, but a few deserve mention.

First, the legislature and the lower court incorrectly assumed that this asserted interest would arrive at this Court

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[11] The time-protection interest asserts that saving *incumbents* time for additional *legislative* responsibilities is a compelling government interest. Even if this dubious proposition were true, no argument has been made that there is a compelling government interest in creating more time in a challenger's schedule.

fresh and novel. To the contrary, the interest was asserted in *Buckley*, but merited barely a mention by this Court. As Judge Winter, who argued *Buckley* before this Court, recounted in his dissent in *Landell*, 382 F.3d at 188-89:

> The time-protection argument was relied upon by the Court of Appeals in *Buckley* in upholding [FECA], was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

Although the Court expressly and soundly rejected equalizing candidate resources and containing political campaign costs as justifications for expenditure limits, 424 U.S. at 26, 54-59, its implicit relegation of the time-protection interest to less discussion than these rejected justifications speaks volumes. In fact, the Second Circuit is the first court to credit such an explanation for spending limits. *See generally Landell v. Sorrell*, 406 F.3d 159, 172 (2d Cir. 2005) (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("[I]n the nearly thirty years since *Buckley*, no court of appeals has found that saving a candidate's time from fundraising is a sufficient interest to justify stifling political speech.").

Second, this purported justification erroneously assumes that total campaign expenditures of *money* are closely correlated with total expenditures of candidate fundraising *time*. This asserted correlation falters for many reasons. To begin with, campaigning and fundraising are not distinct; candidate appearances and speeches (which Act 64 allows to continue) often have a fundraising component. Moreover,

many candidates fund their own campaigns in whole or in part with personal funds, reducing or eliminating time spent fundraising. In addition, professional political fundraisers, many of whom charge a percentage of the amounts raised, as well fundraising volunteers, carry the load for many if not most candidates, reducing the time spent by candidates on fundraising. National, state, and local political parties also provide fundraising assistance, as well as direct funding, for candidates in competitive races.

Just as important, campaigns raise money by way of direct mail and Internet solicitations, requiring little if any candidate time. As one example, during the 2004 Democratic Presidential Primary, Vermont Governor Howard Dean – one of the proponents of Act 64, who is quoted at the outset of the lower court's opinion[12] – shattered fundraising records by raising almost $15 million, more than any other Democratic candidate in history in a single fundraising quarter. *See* Alexis Rice, Fellow at the Center for the Study of American Government at Johns Hopkins University, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning* 45 (2004), *available at* http://www.campaignsonline.org/. *Half* of Governor Dean's contributions were secured through the Internet, *see id.*, requiring *no* investment of his personal time. In the subsequent fundraising quarter, 84,713 supporters made 110,786 contributions to Governor Dean's campaign. *See id.* The average amount per contribution was less than $62. *See id.*

Later in 2004, Senator John Kerry also used the Internet to raise nearly $12.5 million in one month and $3 million *in*

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[12] *See Landell*, 382 F.3d at 96.

only one day for his Presidential Campaign. *See* Glen Justice, *Kerry Sets Web Record in Donations*, N.Y. TIMES, July 2, 2004, at A14. As former Federal Election Commission Chairman Trevor Potter has explained, "The small donor, Internet component . . . demonstrates the importance of Internet fundraising." Lisa Getter, *The Race to the White House: Kerry up to $180 Million*, L.A. TIMES, July 2, 2004, at A27.

The well-publicized success of federal candidate fundraising on the Internet has led state and local candidates to incorporate Internet fundraising as part of their campaign strategies. *See e.g.*, Tracie Dungan, *Hopefuls Putting Hands Out on Web: Campaigns Tap Online Potential*, ARK. DEMOCRAT-GAZETTE, Nov. 13, 2005. Indeed, many *Vermont* political parties[13] and politicians, including incumbent candidates for Lieutenant Governor,[14] State Senate,[15] State Representative,[16] and Mayor,[17] have used the Internet to raise campaign funding without consuming candidate time. In short, there is no sound basis either in this record or elsewhere to show convincingly that responsible public officials are shirking their official duties to raise campaign cash.[18]

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[13] *See* http://www.vtgop.org; http://www.vtdemocrats.org; http://www.vtlp.org; http://www.progressiveparty.org; and http://www.windhamdem.org.

[14] *See* http://www.briandubie.com.

[15] *See* http://www.mattdunne.com.

[16] *See* http://www.timjerman.com and http://sueminter.com.

[17] *See* http://www.hindaformayor.com.

[18] Candidates vary immensely in their ability to raise money. One candidate might devote countless hours to fundraising without accumulating funds that reach the expenditure limit; another might reach or exceed the same limits in substantially less time. Put another way, Act

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Third, as the Sixth Circuit has observed, the "time-protection" justification is inextricably linked with – and in reality is a euphemism for – the cost containment justification repudiated in *Buckley*. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 916-17 (6th Cir. 1998) ("The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.").

Fourth, the sole purpose of the time-protection interest is to assist incumbent legislators in enhancing their job performances by decreasing the number of hours necessary to raise money to compete with their challengers.[19] By enacting dollar limits to assist legislator-candidates with their official job responsibilities, however, the legislature unfairly burdens challengers and further insulates incumbents from competitive elections.

Taking the preferred justification at face value, we are told that incumbent legislators who spend less time fundraising because of expenditure limits are able to schedule more time for official responsibilities such as studying legislative proposals, attending legislative hearings, and

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64 incorrectly assumes that fundraising places equal demands on the time of all candidates.

[19] *See generally Landell*, 406 F.3d at 172 (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, 'The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier.' It has an interest in the former, but certainly not the latter.").

meeting with constituents. But all of these activities lead to increased political exposure for incumbents. Empowered with the bonus hours made possible by the expenditure caps, they are more capable of attending "meet and greets," speaking at Rotary Club and Jaycee meetings, holding press conferences, meeting with newspaper editorial boards, and participating in local television and radio interviews. In sum, any additional time made available and actually used for official duties will only enhance the power of incumbency, because incumbents, unlike challengers, can more easily attract free media attention and exposure by their official activities.

Non-incumbent candidates, on the other hand, are much less likely to benefit from the asserted time-protection resulting from Act 64's expenditure limits. With expenditure limits, the ability of challengers even to divert the unused fundraising time to travel and campaign events will be limited because all those campaign activities cost money. Precisely because they are less able to attract media attention and exposure than incumbents, challengers need to spend additional money to compensate for the incumbent's natural advantages.[20] For example, incumbency provides several

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[20] Validating (but not ameliorating) this concern, Vermont arbitrarily enacted a "rare" accommodation for challengers in its campaign finance law that requires certain incumbents to spend at least 10 to 15-percent less than the statutory limits in an election cycle. In contrast, challengers may spend up to 100-percent of the expenditure limit. *See* VT. STAT. ANN. tit. 17, § 2805a(c) ; *see also Landell*, 382 F.3d at 128. Thus, an incumbent candidate for Governor may spend $45,000 less than a challenger in an election cycle; $15,000 less in races for Lieutenant Governor; $6,750 less in races for secretary of state, state treasurer, auditor of accounts or attorney general; and between $650 and $200 less in races for the general assembly and county offices. *See* VT. STAT. ANN. tit. 17, § 2805a(a), (c). Even with the more generous spending allowances for challengers, however, the statute impinges their

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advantages in an election, including name identification, increased media exposure, and use of public resources associated with the officeholder's position.[21] Expenditure limits place substantial burdens on the ability of challengers to overcome these advantages by restricting the volume of their political expression, and inhibiting them from mounting adequate challenges to incumbents.

Finally, there is no basis for distinguishing fundraising from other time-demands in a legislator's schedule. Although the premise of the time-protection argument is that government has an interest in legislators dedicating more time to officeholder duties, only fundraising is singled out as a burden on those responsibilities. This ignores countless other campaign activities, such as political party luncheons and candidate forums, which may subtract equal or greater amounts of time from an officeholder's schedule.[22] Also oddly, unlike many states, Vermont does not require its legislators to give up or limit time spent in outside

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First Amendment rights by substantially limiting what they may ordinarily be able to spend to engage in political dialogue.

[21] Examples include government websites, press releases, media advisories, and constituent or "franked" mail.

[22] *See e.g., Homans v. City of Albuquerque*, 366 F.3d 900, 912 (10th Cir. 2004) ("The claim that fund-raising prevents officeholders from engaging in alternative campaign tactics such as individual door-to-door contact is interesting. Albuquerque does not articulate any reason why there is a compelling state interest in channeling campaign resources to favor individual voter contact rather than fund-raising tactics. *There is no indication in the record that, for example, the added burden of fund-raising events and phone calls is more demanding on an officeholder's time than the burden of individual voter contact.* Nor does the record persuade us that individual voter contact is a fundamentally superior campaign strategy because fund-raising efforts compromise an officeholder's ability to communicate with the public.") (emphasis added).

employment, *see* VT. STAT. ANN. tit. 2, §§ 1-22 and JOINT RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES OF VERMONT (adopted Jan. 30, 1990), *available at* http://www.leg.state.vt.us/misc/rules2.htm, casting further doubt on the legitimacy of the "time-protection interest." At bottom, the only policy interest advanced is a circular one: it frees lawmakers from *fundraising activities*.

In sum, the time-protection interest serves only the interest of incumbent officeholders. Vermont has no compelling interest, however, in protecting the schedules of incumbent lawmakers from fundraising activities. Because time-protection is not a valid interest supporting Vermont's expenditure limits, this Court should reverse the lower court.

C. Act 64's Expenditure Limits Are Not Narrowly Tailored To Advance the Asserted Interests of Anti-Corruption and Time-Protection.

In addition to being justified by a compelling government interest, expenditure limits must be "sufficiently narrowly tailored to achieve" that interest. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990). Furthermore, a government must employ the least restrictive means possible to advance that interest. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004). In this case, even if the Court were to determine that anti-corruption and time-protection are compelling government interests justifying expenditure limitations – and they are not – Act 64 would fail for lack of narrow tailoring.

1. Act 64's Expenditure Limits Do Not Advance the Asserted Interests of Anti-Corruption and Time-Protection.

Expenditure limits are not effective in reducing the *appearance* of corruption in the electoral process. To the

contrary, Act 64 perversely *promotes* corruption because its limitation on expenditures (and hence the number of contributions that might be accepted) *increases* the significance of each individual contribution. Under a regime of contribution limits with no spending cap, the likelihood of corruption diminishes as the number of contributors increases.

Also perversely, Act 64 does not limit the total amount a candidate can *raise*; it limits only what he can *spend*. At any time of heightened interest in the legislative agenda – when the hypothetical potential for *quid pro quo* corruption is at its zenith – a legislator may decide to amass a large war chest for use in future electoral cycles or to pursue other political ambitions. Thus, the expenditure limitations may not even limit time spent fundraising during the busiest legislative periods.

Even if effective at reducing time spent fundraising, Act 64 does not ensure that incumbents will devote additional time to their official duties. For example, Elizabeth Ready, a Vermont legislator and Respondent-Intervenor in this case, testified at trial that expenditure limits would help eliminate the burdens of fundraising and enable her to campaign door-to-door, visit county fairs, and attend local events. *See Landell*, 382 F.3d at 123. Although these activities may increase person-to-person contact with some constituents, they are more accurately described as campaign activities rather than official duties.

Furthermore, expenditure limits hinder a candidate's ability to campaign efficiently using paid-communication methods such as direct mail, television, radio, and newspaper advertisements. To the extent that expenditure limits force incumbents to rely more on time-intensive personal campaigning rather than media advertising that will reach

more voters, the limits defeat the ostensible purpose of time-protection for incumbents.

2. Act 64's Expenditure Limits Are Not the Least Restrictive Means of Advancing the State's Asserted Anti-Corruption and Time-Protection Interests.

Even if anti-corruption and time-protection are compelling interests that might sustain Act 64's expenditure limits, and even if Act 64 advances those interests to some degree, Act 64 does not do so in the least restrictive manner.

First, Vermont's expenditure restrictions will demonstrably *reduce speech* because the statute's spending caps are based on expenditure *averages* from previous elections, including those that were nominally contested. *See Landell*, 382 F.3d at 173-74. By definition, many prior campaigns – usually the most competitive ones where incumbents were most at risk – cost more than the legislatively-mandated averages. Consequently, expenditures, and thus speech, in the most competitive races will actually *diminish* as a result of the arbitrary calculations. *See Buckley*, 424 U.S. at 20 (invalidating expenditure limits that "would have required restrictions in the scope of a number of past congressional and Presidential campaigns").

Second, the expenditure limit unnecessarily prohibits candidates from using their own resources. As *Buckley* forcefully ruled, "the First Amendment simply cannot tolerate [FECA's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. Just as a self-financing candidate cannot corrupt himself, his use of personal resources also does not require expenditure of time raising money from others.

Third, the legislation unnecessarily and unfairly regulates spending in *all* races by *all* candidates. To protect the time of officeholders so they may legislate and perform their official functions, it is unnecessary to limit expenditures in *open seat* contests between *non-incumbents*. Nor is it necessary to limit spending by non-incumbents running against incumbents. As noted above, incumbents have various "in kind" political advantages by virtue of holding their offices, so they would not be unduly disadvantaged by expenditure limits that applied solely to incumbents.

Fourth, other states such as Georgia, *see* GA. CODE § 21-5-35(a), have used a less restrictive time limitation on fundraising, prohibiting candidates from raising money while the legislature is in session.[23] This approach would complement Vermont's current statutory framework, *see* VT. STAT. ANN. tit. 2, § 266(3), which prohibits lawmakers from accepting contributions from *lobbyists* during legislative work periods.[24]

Finally, Act 64 is overbroad by limiting expenditures, regardless of the source of the funds. As shown (pp. 20-21 above), expenditures derived from telemarketing, direct mail, the Internet, and other non-personal forms of solicitation do not require a substantial investment of personal time from the

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[23] *See also* ALA. CODE § 17-22A-7(b)(2); IND. CODE § 3-9-2-12; IOWA CODE § 68A.504(1); LA. REV. STAT. ANN. § 18:1505.2(Q)(1), (R)(1); MD. CODE ANN., ELEC. § 13-235; NEV. REV. STAT. 294A.300, 310; N.M. STAT. ANN. § 1-19-34.1; OKLA. STAT. tit. 74, § 257:10-1-6; TENN. CODE ANN. § 2-10-310(a)(1), (b); and TEX. ELEC. CODE. ANN. § 253.034.

[24] Other states precluding lobbyist contributions during legislative sessions include Arizona, ARIZ. REV. STAT. § 41-1234.01, and North Carolina, N.C. GEN. STAT. § 163-278.13B. Moreover, states like Kansas, KAN. STAT. ANN. § 25-4153a, permit legislators to accept contributions only from *individuals* during legislative sessions.

candidate. Thus, to the extent that time-protection is a valid interest, and to the extent that Act 64 advances that interest with regard to personal solicitations, Act 64 is still overbroad because it restricts expenditures derived from non-personal solicitation sources.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to reverse the decision of the Second Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*

Respondents/Cross-Petitioners.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents/Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, NEW MEXICO, OREGON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether the state interest in combating the public perception of corruption and distortion in the electoral process caused by unlimited campaign spending may sustain narrowly tailored expenditure limits against a First Amendment challenge.

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INTEREST OF THE *AMICI CURIAE*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire; Rebecca Vigil-Giron, Secretary of State of New Mexico; Bill Bradbury, Secretary of State of Oregon; and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their respective States. This responsibility gives them extensive experience with the issues raised in this case.

This case involves a challenge to amendments to Vermont's campaign finance laws – including a limit on campaign expenditures – that were enacted in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. See *Landell* v. *Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments were enacted to serve what the Second Circuit described as "at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the district court in this case found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals. *Id.* at 116-125. For Vermont, at least, meaningful reform can occur only with the implementation of mandatory spending limits.

Amici submit that affirmance of the Second Circuit's decision upholding Vermont's law is essential if state and local governments are to have the tools that are necessary to protect the integrity of the electoral process. *Amici* believe that

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), is not properly read to establish a *per se* prohibition on mandatory campaign spending limits. But if *amici* are incorrect in that view, they urge the Court to reconsider that decision and permit Vermont to demonstrate that its campaign expenditure limits should survive strict scrutiny. A decision by this Court that the Constitution does not erect an insuperable, *per se* barrier to campaign spending restrictions will assist the states, as laboratories of democracy, in addressing widespread public dissatisfaction with the current system of electioneering – a dissatisfaction that is having a corrosive effect on the citizenry's faith in the democratic process and is discouraging voters from participating in state elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Vermont officials and their other *amici* address the governing constitutional doctrine, explaining why the First Amendment should not be understood to preclude absolutely the enactment of campaign expenditure limits. *Amici* Secretaries of State will not repeat those doctrinal arguments here. Instead, *amici* will address two points of great concern to public officials with responsibility for the integrity and vitality of state electoral systems: (1) unlimited campaign expenditures undermine public confidence in the electoral process, and thus in the democratic system itself; and (2) state and local experimentation with differing methods of campaign finance regulation may help in the development of effective solutions to this profoundly vexing problem.

Amici urge the Court to uphold the constitutionality of Vermont's mandatory campaign spending limits, thus allowing state legislatures to employ this kind of tool as they seek to address constituent concerns regarding the corruption (real and perceived) and distortion of the political process that are attributable to the unlimited campaign spending. The case for so equipping state legislatures is compelling. Public dissatisfaction with the current system of campaign finance is at an alarmingly high level. Objective indicia reveal that the

public strongly believes that excessive spending fosters corruption of the electoral process. The depth of this concern is confirmed by repeated attempts by state legislatures to reform systems of campaign finance.

A holding that campaign expenditure limits are not *per se* unconstitutional would have healthy consequences for the Nation's political system as a whole. It would permit States to experiment with novel methods of campaign finance reform and to determine which of those methods work best in the real world. This point is illustrated by the unique experience of Albuquerque, New Mexico, which maintained a system of campaign expenditure limits for almost three decades after *Buckley*. That regime attracted extraordinarily broad levels of public support, fostered electoral competition, reduced the inertia of job security for incumbents, and increased public participation in elections for city office. Albuquerque's history strongly suggests the wisdom of relying on the legislative process to develop creative solutions to the pressing social problem of public dissatisfaction with the campaign finance system.

ARGUMENT

A. States Have A Compelling Interest In Using Carefully Crafted Expenditure Limits To Combat A Pervasive Public Perception Of Corruption And Distortion In The Electoral Process

1. This Court has held repeatedly that combating the *appearance* of corruption is a compelling government interest that may properly be redressed with appropriately tailored campaign finance reform. See, *e.g.*, *Buckley*, 424 U.S. at 25; *McConnell* v. *FEC*, 540 U.S. 93, 142 (2003); *FEC* v. *Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 496-497 (1985). There is nothing "novel [ ]or implausible" in that proposition (*McConnell*, 540 U.S. at 144); the perception that moneyed interests have excessive influence in the political process breeds cynicism about the machinery of democ-

racy and "could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't Political Action Comm'n*, 528 U.S. 377, 390 (2000).

Of particular importance here, this problem is not limited to campaign *contributions*, which pose the most obviously plausible risk of corrupting the political process. Governments at all levels have a vital interest in fashioning an electoral system that assures their citizens that the fruits of the process will be an honest, objective, responsive public administration. As the amounts *spent* on American elections have soared, however, there has been a proportional escalation in public cynicism about the quality of government these expenditures have purchased. Here, *amici* focus on this important aspect of the problem: unlimited campaign *expenditures* have a corrosive effect both on voters' confidence in the integrity of government and on public willingness to participate in the political process.

That danger was a central rationale for enacting Vermont's limitation on campaign expenditures. The state legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased," and that "[c]itizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns." 1997 Vt. Laws P.A. 64 (H.28), ¶¶ 4, 10. Those findings were amply supported by polling of the Vermont electorate and the testimony of the State's elected officials. See *Landell*, 382 F.3d at 116-117. And it was confirmed by the district court in this case, which found as a fact that the State's expenditure limits would serve to preserve faith in democracy. *Landell* v. *Sorrell*, 118 F. Supp.2d 459, 482-483 (D. Vt. 2000), affirmed in part and vacated in part by 300 F.3d 129; see *Landell*, 382 F.3d at 103.

2. The concern that motivated the Vermont legislature is ubiquitous across the Nation: Empirical data reveal the existence of a pervasive public perception of corruption in elec-

tions that is inextricably intertwined with dismay about excessive campaign spending. It is imperative that state governments have the tools to combat this perception, which is undermining public faith in the integrity of government.

The logical connections that have led much of the public to become disillusioned by unlimited spending on political campaigns are not hard to discern. To begin with, the issue is not just one of "corruption" in the classic sense of bribery or something akin to it. See Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L. J. 1, 5-7 (1997) (discussing varying theories of corruption and their respective scopes). Rather, a significant public concern is that excessive and often grossly imbalanced spending muffles the voices of some candidates and distorts the way vital public issues are ventilated during a campaign. This concern is validated by the reality that approximately 90 per cent of the time, the candidate who spends the most money wins the election. U.S. PIRG Education Fund, THE WEALTH PRIMARY: THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL PRIMARIES at 4 (2002), *available at* www.uspirg.org/ reports/WealthPrimary10_02.pdf.

But that is only one aspect of a larger problem: voters believe that if expenditures are not capped, candidates will be forced to go all out to raise money. That imperative, in the public's view, has myriad unfortunate effects. It fosters classic "money under the table" corruption because it puts a premium on getting campaign cash. It forces elected officials to shirk official duties in favor of raising money and mollifying contributors. With so much money flowing into the system, ordinary voters get the (reasonable) impression that the recipients of that money will be responsive to contributors rather than to the broader electorate. And the ability to spend unlimited amounts gives incumbents a virtually insuperable advantage when they seek re-election; incumbents typically raise more money than their challengers – and almost inevitably win – because contributors may believe (correctly or

not) that they will receive official favors in return for contributions.

Contribution limits, especially in the era of "bundling," are not a complete answer to any of these problems. And the more that is spent on campaigns – with endless television commercials, direct mail, and computerized telephone calls all visible to or heard by the electorate – the more a typical voter will see the visible fruits of campaign spending. Inevitably, this barrage will lead reasonable voters to conclude that raising and spending money is all candidates care about.

Thus, even with contribution limits in place, the evils of an accelerating race for campaign cash sap public confidence in the electoral system:

> The predictable effect [of a bar on expenditure limits] has been to increase the pressures to satisfy the ever-increasing, but uncontrollable, demand for campaign cash. * * * Instead of freeing the political process from the effects of wealth disparity and the reality and appearance of corruption, the mutation produced by *Buckley* places unending pressure on public officials to raise money from special interests in a highly public manner calculated to create precisely the appearance and reality of quid pro quo corruption that the *Buckley* Court recognized as a threat to the democratic process.

Neuborne, *supra*, 37 WASHBURN L.J. at 33-34, 37.

3. This concern is not just theoretical: it is borne out by hard data. Nationally, over two-thirds of registered voters believe that candidates spend too much money on election campaigns. Lake Research Partners, *Survey Results from a Nationwide Survey of 1000 Registered Voters* (hereinafter "*National Survey*"), at 7 (2006), *available at* http://demos.org/campaignfinancesurvey. A nearly identical number correlated election spending with the integrity – or lack of integrity – of the electoral process. *Id.* at 13.

Targeted state polls reveal more detailed insights into voters' perceptions regarding the relationship between corruption and campaign spending. Strikingly, 68 percent of Pennsylvania voters believe that the current level of campaign spending is a "serious threat [to] the basic fairness and integrity of our political system." Lake Sosin Snell Perry & Assoc., Inc., *Banners From a Survey of 500 Registered Voters in the State of Pennsylvania* (hereinafter "*PA Survey*") at 3 (1998), *available at* http://www.courts.state.pa.us/Index/Supreme/appenda.pdf. In fact, "[c]orruption is the word that voters themselves use most frequently in describing what is wrong with campaigns and elections today." *PA Survey*, at 16. Voters in Maryland also equated campaign spending with the term "corruption." The Center for American Politics and Citizenship, University of Maryland, and The Schaefer Center for Public Policy, University of Baltimore, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, at 2 (2002), *available at* www.capc.umd.edu/rpts/MDCampFinSrvy.pdf. The public perception of the situation has deteriorated over time, resulting in a current assessment of democracy as being, in effect, broken. *PA Survey*, at 16; see also *id.* at 11.

Pennsylvania and Maryland have company in this perception. In the words of one commentator, Wisconsin poll results in 2005 "revealed a stunning cynicism, confirming other surveys that consistently place politicos and journalists near the used car salesmen in public confidence." Thomas C. Reeves, *Selfish Politicians* (2005), at 1, *available at* http://hnn.us/blogs/entries/18029.html. The commentator was reacting to figures confirming that "only 6% of the residents in Wisconsin believe their elected official represent the interests of the constituents on important issues." Wisconsin Policy Research Institute, Inc., *Wisconsin Citizen Survey*, October 2005 (hereinafter "*Wisconsin Survey*"), at 12, *available at* http://www.wpri.org/Reports/Volume18/Vol18o6.pdf. Wisconsin voters split nearly evenly between believing that local

officials represent their own interests and believing that they represent special interests. *Ibid.*

The widespread perception that excessive campaign spending is distorting the political process also is reflected in survey data showing that the voting public believes campaign spending limits would curtail corruption of the process. The vast majority – 87 per cent – of registered voters across the country favor the implementation of spending limits. *National Survey* at 8. More than three-quarters of those polled see spending limits as a deterrent to corruption in campaigns. *Id.* at 12. Targeted polls in selected states yield similar results:

- "In November 2000, voters in 56 of Wisconsin's 72 counties were asked whether they supported campaign finance reform that would limit contributions and expenditures and require complete and timely disclosure. Over 90% of the voters answered 'yes' in this referendum * * * ." Wisconsin Briefs from the Legislative Reference Bureau, Brief 01-9, at 1 (March 2001), *available at* http://www.legis.state.wi.us/lrb/pubs/wb/01wb9.

- When polled on spending in judicial elections, 59 per cent of a split sample believed that candidates in Pennsylvania spend too much money, not having been told how much candidates spend. That number jumped to 81 per cent for the portion of the split sample that was given an example of how much a candidate spent last year. *PA Survey* at 4.

- Similarly, "56 per cent of Ohioans favor spending limits for judicial elections." Frontline, *Justice for Sale, Summaries of Selected Studies*, at 6, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/ justice/que/studies.html.

- When West Virginia voters were polled regarding whether they believed "there should be a limit on

how much a person can spend on running for public office," more than 75 per cent said yes, while only16.8 per cent said no. Ken Hechier, *Financing Elections: West Virgina, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990).

4. Public concern about electoral excesses – and, in particular, with unlimited campaign expenditures – also is reflected in repeated legislative efforts to reform the campaign finance process, at both the state and the federal level. That legislatures have turned to this subject time and again powerfully illustrates continuing dissatisfaction among the electorate.

Before *Buckley*, states experimented widely with expenditure limits. In reaction to public discontent with the spoils system at the turn of the twentieth century, many states enacted spending caps. "[B]y 1932 over half of the states had such provisions. By 1964, thirty states had provisions that attempted, in one way or another, to limit total campaign expenditures." Gross & Goidel, THE STATES OF CAMPAIGN FINANCE REFORM (2003), at 4.

Congress, too, experimented with campaign spending limits for House of Representatives and Senate races. See Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907), as amended by Pub. L. No. 62-3, 37 Stat. 25 (1911) (effecting expenditure limits of $5,000 and $10,000 for U.S. House and Senate campaigns, respectively); Corrupt Practices Act, Pub. L. No. 68-56, 43 Stat. 1070 (1925) (raising those limits to between $2,500 and $5,000 for U.S. House campaigns and between $10,000 and $25,000 for U.S. Senate campaigns).

The Court's decision in *Buckley*, of course, has been widely thought to bar expenditure limits. The consequences of that result have been as damaging as they were predictable. In the post-*Buckley* period, voter participation in both national and gubernatorial elections has generally declined.

Gross & Goidel, *supra*, at 88. Indeed, in 1996, voter cynicism led to the lowest voter turnout in a presidential race in five decades. Donald J. Simon, *Beyond Post-Watergate Reform: Putting and End to the Soft Money System*, 24 J. LEGIS. 167, 174 (1998).

In light of this decline in voter participation, it is not surprising that the appetite for reform at the state and local level remains strong. State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived approach to expenditure limits. For example:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98. Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, available at* http://www.campaignfinancesite.org/structure/states1.html.

- From 1972-1996, 45 campaign finance initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment. *Ibid.*

- As of 1998, 24 states had statutes providing some sort of public financing for election campaigns. *Ibid.*

- At least 15 states and major cities such as New York, Seattle, Portland and San Jose have some sort of voluntary expenditure limitation. See Federal Election Commission, *Campaign Finance Law 2000: CHART 3-A: EXPENDITURE LIMITATIONS, available at* www.fec.gov/pubrec/cfl/cfl00/cfl00chart3a.html; Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, supra;* Seattle, City Council Ordinance 107772 (Nov. 30 1978); Press Release, Public Campaign, *"Voter Owned Elections" Be-*

comes Law in Portland, Oregon, (May 19, 2005), *available at* www.publicampaign.org/pressroom/pressreleases/release2005/release_05 _19_05.htm; National Civic League, *Spending Limits Working in San Jose, California*, 3 NEW POLITICS, at 3 (Spring 2002).

- Other states and localities have seen their reform efforts run afoul of what courts perceived to be *Buckley*'s absolute bar on expenditure limits. Albuquerque's comprehensive system of expenditure limits, which is discussed in more detail below, was invalidated by the Tenth Circuit in *Homans* v. *City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). Ohio attempted to enact spending limits at both state and local levels, but the Sixth Circuit invalidated spending limits in city council races (*Kruse* v. *City of Cincinnati*, 142 F.3d 907 (6th Cir.), cert. denied, 525 U.S. 1001 (1998)), and held that *Buckley* bars spending limits in state judicial campaigns. *Suster* v. *Marshall*, 149 F.3d 523 (6th Cir. 1998). And the federal courts struck down Proposition 73, approved by the California electorate, which prescribed (among other reforms) mandatory limitations on certain types of political expenditures.[2] See *Serv.*

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[2] Majorities of voters supported both Proposition 73 and Proposition 68, which contained voluntary campaign spending limits accompanied by public financing of campai ,ns. See Robert Dreyfuss, *Reform Beyond the Beltway, States as Laboratories of Clean Money*, 38 THE AMERICAN PROSPECT 50, 53-54 (May/June 1998). Voters preferred the system of mandatory spending limits by an appreciable margin. Before it was invalidated, California courts held that Proposition 73 should take precedence over Proposition 68 because it received more votes. *Taxpayers to Limit Campaign Spending* v. *Fair Political Practices Comm'n*, 51 Cal. 3d 744 (1990).

Employees Int'l Union v. *Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989); *Service Employees International Union* v. *Fair Political Practices Comm'n*, 747 F. Supp. 580 (E.D. Cal. 1990), aff'd, 955 F.2d 1312 (9th Cir. 1992).[3]

Campaign finance reform was achieved most recently in Connecticut – in an effort that clearly illustrates the connection between public cynicism about the electoral process and the perceived need to limit campaign expenditures. In reaction to a corruption scandal that sent Governor John G. Rowland to prison, Governor M. Jodi Rell announced the introduction of sweeping campaign finance reform legislation. In her January 2005 announcement, Governor Rell noted the voters' perception of an association between electoral corruption and unconstrained campaign spending. She observed that one of the three complaints she hears most often from her constituents is that candidates spend too much money on election campaigns. Press Release, The Office of Governor M. Jodi Rell, *Gov. Rell Introduces Sweeping Reform Proposals for Campaign Finance* (January 10, 2005), at 3, *available*

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[3] Ten years later, the citizens of Massachusetts passed a referendum that provided for voluntary spending limits, accompanied by public financing. The state legislature, however, was unwilling to fund the public financing aspect of the referendum. Applying the state constitution, the Massachusetts Supreme Judicial Court held that the law must be funded or repealed. *Bates* v. *Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). The state legislature consequently repealed the law. Michael Saxl & Meaghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and Maine's Solution* (2004), at 476-477, *available at* http://www.law.harvard.edu/students/orgs/jol/vol41_2/saxl.pdf. Another campaign finance reform bill, this one containing mandatory expenditure limits, is now pending in Massachusetts. The bill contains no provision for public financing. Mass. HB No. 118 (2005), *available at* http://www.mass.gov/legis/bills/house/ht00/ ht00118.htm.

at http://www.ct.gov/governorrell/cwp/view.asp?Q=288454&A=1761; see also WHDH 7 News Boston, *Connecticut Lawmakers Pass Sweeping Campaign Finance Bill* (Dec. 21, 2005), *available at* http://www2.whdh.com/news/articles/national/BOS10050/. The reform bill, signed into law by Governor Rell in December 2005, provides for voluntary expenditure limits combined with public campaign financing. 2005 Ct. P. A. 5 (enacting 2005 Ct. S.B. 2103).

Connecticut's experience also illustrates the constraints that states feel in this arena, and their concern that *Buckley*'s perceived bar on expenditure limits handicaps effective reform. During the House debate on Senate Bill 2103, an amendment was proposed that would have eliminated the public financing provision in the reform. In response to the amendment's introduction, Representative Spallone, one of the bill's sponsors, emphasized that state reform efforts may be hamstrung unless expenditure limits are permissible:

> In a perfect world, I think that elections based only on individual contributions without public financing may work. However, we operate in the context of a Supreme Court decision from 30 years ago, which effectively said we can limit the amount that each of us can donate to a campaign, but not the amount that we can each spend on our campaign. And that's [*sic*] created the arms race, as it were, in financing for campaigns at the State, national, and local levels.

Transcript of the House Debate of 2005 Ct. S.B. 2103 at 60 (Nov. 30, 2005).

To be sure, popular clamor for a particular outcome generally is not, of itself, a sufficient basis to overcome constitutional limits on legislative discretion. See *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). But the public perception that candidates' excessive focus on campaign dollars has corrupted the electoral process and effectively disenfranchised ordinary voters – which is starkly revealed by the

public opinion data and the history of legislative efforts in this area – is itself a problem of constitutional dimension. Our democratic system rests on the principle that eligible voters will participate in the electoral process and will feel justifiably confident that the process and its results are fair, informed, and responsive. And it is difficult to imagine a constitutional interest more compelling than that of preserving the citizenry's faith in democracy.

Moreover, this is not a problem of sacrificing free speech in order to assure electoral integrity. That is a false choice. It is possible to craft spending limits that allow ample room for candidates and their supporters to convey their message thoroughly and forcefully. Indeed, while unlimited campaign spending may increase the volume of speech in one sense, it also may inhibit robust debate of issues, decrease public involvement and confidence in the electoral process, and foster a fundamental disaffection with democratic governance on the part of the electorate.

B. A Rule That Allows States To Experiment With Campaign Expenditure Limits Permit The Development Of Electoral Systems That Combat Public Cynicism While Preserving First Amendment Values

A holding by this Court that campaign expenditure limits may be permissible would not mean that such limits always (or, for that matter, often) would be upheld. Restrictions on campaign spending would be subject to the most exacting constitutional scrutiny. As the Second Circuit recognized in remanding this case for further fact-finding regarding Vermont's expenditure caps (see *Landell*, 382 F.3d at 135-137), proponents of such limits would be obligated to show that the state regulation truly serves a compelling interest, is narrowly tailored, and was formulated to serve its goal effectively.

Unfortunately, the Court's decision in *Buckley* has been widely understood – erroneously, in our view – to stand for

the proposition that no level of corruption (perceived or real) and no level of distortion in the electoral system could be compelling enough to justify campaign spending limits, and that such limits never could be tailored narrowly enough to survive constitutional scrutiny. See *Landell*, 382 F.3d at 107 (citing cases); *id.* at 151-152, 155-156, 159, 172, 185 (Winters, J., dissenting). As a consequence, many courts and state legislatures have taken *Buckley* to deny states the ability to experiment with novel methods of campaign finance reform or to test the practical consequences of spending caps.

That outcome has been "fraught with serious consequences to the Nation" (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), as states have been unable to make use of what may be the most efficacious tool with which to address the growing public cynicism about the electoral process. By contrast, freeing states to implement expenditure caps if they are able to make the requisite showing would have enormously healthy consequences for the Nation's political system. A constitutional rule that allows states at least to attempt to make the strict showing necessary to justify spending limits could lead to the development of systems that restore public faith in democracy, while also fostering robust debate, candidate interaction with the electorate, a full exploration of pressing issues, and fair campaigns.

This point is illustrated by considering the unique experience of one "courageous" jurisdiction that has been able, in the post-*Buckley* era, to "serve as a laboratory" regarding the real-world effects of campaign expenditure limits. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). Beginning in 1974, the city of Albuquerque, New Mexico, made use of mandatory spending limits in local elections. Until those limits were held unconstitutional by the Tenth Circuit three decades later in *Homans*, this regime served the goals of increasing electoral competition – with *greater* access to office by new candidates and *no* sacrifice in voter participation in

elections for city office. See State PIRGs' Democracy Program, *The Case for Limits on Campaign Expenditures*, at 1, *available at* http://www.buckbuckley.com/pdfs/spending_limits_policy_background.pdf. It also served to decrease the advantage that incumbents typically hold in electoral competition. For example, none of the four mayoral candidates who sought reelection during the period between 1974 and invalidation of the spending limits regained their office. Testimony of Donald A. Gross at Tr. 88:6-89:9, *Landell* v. *Sorrell*, 2:99-cv-00146-WKS (D. Vt. June 2, 2000); Anthony Gierzynski, *Albuquerque Election Financing* (2002), at 5-6, *available at* www.nvri.org/library/cases/albuquerque/electionfinancinganalysis.pdf. Albuquerque's figures contrast sharply with other U.S. mayoral races, in which incumbents are reelected approximately 80 per cent of the time. *Ibid.*

The City's pre-*Homans* experience with campaign spending limits also contrasts sharply with developments in 2005, during Albuquerque's first full election cycle without spending limits. That year, the incumbent mayor raised a war chest of nearly $1.2 million, a record-setting amount for Albuquerque. He was reelected after drastically outspending his opponents. Jim Ludwick, *Chávez Raised, Spent Nearly $1.2 Million*, ALBUQUERQUE JOURNAL, 2005 WLNR 16559603 (Oct. 12, 2005).

Albuquerque's limits held more than 90 per cent public approval when they were first enacted. They remained highly popular, garnering 87 per cent support over twenty years later, near the time the Tenth Circuit felt obliged by *Buckley* to dismantle them. See *The Case for Limits on Campaign Expenditures*, *supra*, at 1. In 1998, after living with expenditure limits for more than two decades, Albuquerque's voters expressed their clear view that the City's campaign finance system was working:

- "Support for spending limits in Albuquerque's local elections is overwhelming and intense. More than eight in ten voters favor a law that limits

spending in local election campaigns, including a solid majority which strongly favors the law. Intense support for spending limits crosses gender, age, education, economic and partisan lines."

- "Voters believe that spending limits have made Albuquerque elections more fair and honest than [those in] other big cities. A solid majority agree on this point and the perception crosses party identification * * * ."

- "When voters are presented with two opposing viewpoints, an overwhelming majority believe that stricter and lower limits on campaign spending improves the fairness of elections in Albuquerque. Similarly, after hearing arguments from both sides, two thirds of voters believe that putting stricter limits on campaign spending improves the honesty and integrity of local elections."

Lake Snell Perry & Assoc., *Public Perceptions of Campaign Spending Limits: Finding from a Survey of 400 Registered Voters in the City of Albuquerque, New Mexico*, at 3 *available at* http://www.nvri.org/library/cases/albuquerque/public perceptions_Albuquerque_NM.pdf.

Other analyses of Albuquerque's campaign finance regulations revealed that voter turnout was at least as high as in other cities of similar size, that incumbents had less of a campaign spending advantage, and that officeholders therefore were more vulnerable when compared to incumbents in similar cities. See *Homans* v. *Albuquerque*, 217 F. Supp. 2d 1197, 1200-1201 (D.N.M. 2002). This led one commentator to find that "democracy in Albuquerque is actually as healthy, if not healthier than in other cities," concluding that Albuquerque's campaign spending limits contributed substantially to this outcome. Gierzynski, *Albuquerque Election Financing*, *supra*, at 4.

Of equal importance, Albuquerque's experience belies the argument that mandatory spending limits serve principally to protect incumbents. Opponents of restrictions on campaign expenditures often advance this "incumbency advantage" argument as a primary rationale. See, *e.g.*, Br. of Vermont Republican State Committee at 42-43; Br. of Mitch McConnell as *Amicus Curiae* at 18-22; *Landell*, 382 F.3d at 151, 183, 196, 199 (Winters, J., dissenting). The fact that the argument falls away in the actual practice of spending limits demonstrates the value of state political experimentation over academic hypothesis in this arena.

Albuquerque's experience holds several lessons for this case. It makes clear that campaign expenditure limits may be tailored to effectively address public cynicism regarding the role of money in political campaigns, while also preserving First Amendment values. And more broadly, it reaffirms the importance – often acknowledged by this Court – of relying on the legislative process to produce creative solutions to pressing social problems.

Accordingly, *amici* urge the Court to make clear that limits on campaign expenditures should be subject to close review – but *not* to scrutiny that is "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). The Court should clarify that caps on spending may be permissible if set at a level that reasonably assures an adequate opportunity to get the candidate's message across to the electorate in an intelligible and comprehensive way. Thus, the constitutional touchstone is a practical one: whether a spending limit is too low to permit the candidate to achieve reasonably broad and consistent access to the electorate. That is a matter on which state legislatures should have discretion, taking into account the nature of the race, the size of the electorate, the availability of media outlets, the costs of various types of communications, and other relevant factors – all subject to judicial review. Such a holding would free state and local governments from artifi-

cial and absolute constraints on their ability to experiment in the realm of campaign finance reform, and thus would equip elected officials with the full complement of tools they need to restore public faith in the democratic process.

CONCLUSION

The Court should affirm the court of appeals' judgment that limits on campaign expenditures may be constitutional, if narrowly tailored and effectively designed.

Respectfully submitted.

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IN THE

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BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, AARP, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND THE UNION FOR REFORM JUDAISM IN SUPPORT OF THE RESPONDENTS-CROSS-PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

The *amici curiae* are organizations that advocate for campaign finance reform, including limits on campaign spending, in order to foster greater public participation in matters of government, increase electoral competition, and reduce the appearance of impropriety in the electoral

process.[1] The current perception in state and local government that all spending limits are per se unconstitutional presents a significant barrier to their work in engaging the public in the reform process.

TheRestofUs.org is a nonprofit, nonpartisan organization whose mission is to reduce the influence of money on the political process. TheRestofUs.org works to inform and educate mainstream Americans, including the citizens of Vermont, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of Vermont PIRG, other state PIRGs have an interest in enacting spending limits in their states.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including Vermont, Common Cause's mission is to ensure open, accountable, and effective government at the federal, state, and local level. Common Cause advocated for the spending limit provisions of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, and participated in the defense of FECA before the Supreme Court.

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, including Vermont, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. The League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

AARP is a nonpartisan, nonprofit membership organization with more than thirty-six million members age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP neither supports nor opposes candidates for public office. Nor does it contribute money to candidates for public office or to political parties. AARP educates the public about issues of concern to older Americans and their families through voter guides, issue workshops, candidate forums, and advocacy issue ads. AARP has long advocated that political campaigns focus on discussion of matters important to all Americans. AARP Vermont was active in supporting enactment of Vermont Act 64, the statute in question in this case. The legality of state limits on campaign expenditures affects AARP's interest — and that of AARP members across the nation — in protecting the integrity of our election processes.

Public Campaign is a nonprofit, nonpartisan organization dedicated to campaign reform that aims to reduce the role of

big special-interest money in American politics. Public Campaign works with a range of organizations, including some in Vermont, whose members are not fairly represented under the current campaign finance system in many states.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan organization that, through litigation, focuses Americans, including the citizens of Vermont, on unethical conduct on the part of government officials. CREW's aim is to encourage government officials to act in the public interest.

The Union for Reform Judaism, founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. *Deuteronomy* 16 teaches: "You shall not judge unfairly: you shall know no partiality; you shall not take gifts, for gifts blind the eyes of the discerning and upset the pleas of the just." The *Talmud Tractate Kethuboth* notes, "What is the reason [for the prohibition against taking] a gift? Because as soon as a man receives a gift from another he becomes so well disposed towards him that he becomes like his own person, and no man sees himself in the wrong." For Reform Jews, these ancient lessons resonate today in witnessing repeated examples of the intentional or unintentional corrupting influence of money on our public policy process.

SUMMARY OF ARGUMENT

Under the Constitution's Guarantee Clause, states are obligated to maintain a republican form of government — a government of the people. In an effort to meet this obligation, the Vermont legislature enacted Act 64 in 1997, that, among other things, limited the amount of money state candidates can spend on their campaigns. *See* Vt. Stat. Ann. tit. 17, §§ 2801 *et seq*. After a series of appeals ending in the

Second Circuit's denial of a rehearing en banc, the Second Circuit recognized that *Buckley* v. *Valeo*, 424 U.S. 1 (1976), did not impose a sweeping "fatal in fact"[2] strict scrutiny to all forms of expenditure limits.

Buckley's review of expenditure limits recognized that those limits could be justified by interests beyond the effort to eliminate corruption in elections. One interest that weighs strongly in favor of reform is the state's interest in preserving its republican form of government. The underlying principle of a republican government is that citizens have the right and responsibility to elect representatives to govern them. The representatives, in turn, must act in the interest of those they represent. This relationship thrives when representatives deliberate upon and determine the collective best interest. The republican form of government also depends on public participation in elections and in communicating with their representatives, which enhances the legitimacy of government and improves public policy by fostering the involvement of citizens with a wide range of perspectives.

In enacting expenditure limits, Vermont understood the importance of deliberation and public participation in preserving a republican form of government. These important traditions have long been part of Vermont's political culture. Act 64's expenditure limits promote deliberation and public participation by preventing corruption and its appearance; increasing the competitiveness of elections and the number of candidates who can run for elected office; creating more time for deliberation among elected officials; and fostering contact between voters and candidates.

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[2] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

Amici respectfully request that the Court defer to Vermont's efforts to maintain a republican form of government through promoting deliberation and participation, and affirm the Second Circuit's decision with respect to Vermont's campaign expenditure limits.

ARGUMENT

I. *BUCKLEY* DOES NOT PRECLUDE STATE REGULATION OF CAMPAIGN EXPENDITURES.

This Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1, expressly left open the possibility that campaign expenditure limits, when sufficiently tailored, *can* pass constitutional muster. The Second Circuit recognized this and held below that state interests other than the avoidance of corruption balance against, and may indeed outweigh, competing interests. *See* Pet. App. 136a-146a. One interest strongly supporting spending limits — an interest unquestionably contemplated by the Constitution — is the protection of a state's republican form of government. That interest weighs dispositively in favor of sustaining the limits at issue in this case and affirming the holding of the Second Circuit.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA") reforms Congress passed to prevent corruption and the appearance of corruption. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On that record, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify . . . [the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). But in so holding, the Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh free speech concerns. *See* Pet. App. 113a-118a.

Buckley related solely to a federal regulation of federal candidates. The Court has never considered the constitutionality of a *state's* regulation of expenditures of candidates for *state* office for the purpose of protecting the republican form of *state* government. The Court's analysis of Vermont's expenditure limits should take into account that these limits represent a *state's* conscious and considered effort to bolster deliberation and political participation in order to prevent the erosion of its republican government. This distinction from *Buckley* changes the constitutional calculus in at least two ways. *First*, the Constitution's affirmative protection of states' republican forms of government counsels deference when the states enact protective measures of their own. *Second*, states have a significant interest in preserving their republican forms of government through enhanced deliberation and political participation.

II. VERMONT HAS A VITAL INTEREST IN PRESERVING ITS REPUBLICAN FORM OF GOVERNMENT THROUGH AN ELECTION PROCESS THAT ENCOURAGES PUBLIC INVOLVEMENT AND DELIBERATION.

Vermont has an undeniable right to preserve the integrity of its own government and electoral system. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788-789 (1978) ("[P]reserving the integrity of the electoral process . . . [is an] interest[] of the highest importance."); *accord McConnell* v. *FEC*, 540 U.S. 93, 136-137 (2003) (considering competing interests such as the integrity of the electoral process). Vermont designed its expenditure limits to (1) "bolster voter interest and engagement in elective politics" and (2) "enhance the quality of political debate and voters' understanding of the issues." Pet. App. 127a. These interests are themselves safeguarded by the Constitution

because they protect and strengthen the infrastructure of Vermont's representative government. Under the Guarantee Clause,[3] Vermont's efforts to achieve those ends, among others, are entitled to deference even in the face of competing First Amendment interests.[4]

A. The Court Should Defer to a State's Effort to Preserve the Republican Form of its Government.

The Court should weigh the state interests affected by expenditure limits in the context of the particular system of

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[3] "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4.

[4] First Amendment interests have been advanced both against and in favor of campaign finance reforms. *See Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400-401 (2000) (Breyer, J., concurring) ("constitutionally protected interests lie on both sides of the legal equation"). The Guarantee Clause is closely aligned with and predated the First Amendment protections weighing in favor of reform:

> Because it was adopted prior to the drafting and ratification of the First Amendment, and long before the First Amendment was applied to the states, the assurance of republican governments also can be seen as independently protecting public deliberations in the law-making process.

Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. Colo. L. Rev. 849, 865-869 (1994); *see also* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767, 828 (2003) (protecting the republican form of government under the Guarantee Clause is a compelling government interest for enacting campaign finance reform). And some, such as former Chief Justice Rehnquist, have suggested that the Fourteenth Amendment incorporates only the "general principle" of the First Amendment (presumably on both sides of the campaign finance reform issue), which could further elevate the relative weight of the Guarantee Clause in this instance. *See Buckley*, 424 U.S. at 291 (Rehnquist, J., concurring and dissenting).

government that the spending limits were enacted to protect. *See generally* Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 Hastings L.J. 77 (2004). Here, the logical starting point is the republican form of government, from which flows its corresponding values of deliberation and public participation.

Vermont enacted expenditure limits to protect the integrity of the republican form of government it is, under the Guarantee Clause, constitutionally obliged to maintain. *See* U.S. Const. art. IV, § 4; *Minor* v. *Happersett*, 88 U.S. (21 Wall) 162, 175 (1874). Not only does the Guarantee Clause require states to maintain a republic, but it expressly compels the United States, which includes the federal judiciary, to help states achieve that goal. For this reason, the interest in preserving republican government weighs heavily in favor of supporting the constitutionality of a state statute and courts should defer to a state's determination that a challenged statute protects that interest. This deference is consistent with the Supreme Court's repeated affirmation, under the Guarantee Clause, of the states' right and responsibility to control their governments. *See Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (each state has a "constitutional responsibility for the establishment and operation of its own government") (citing U.S. Const. art. IV, § 4); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991).

Although all states have an obligation to maintain a republican form of government, they may choose to approach that goal differently. The states' varied sizes, demographic compositions, and political cultures require tailored strategies that respond to their individual circumstances. Familiar examples abound. Most states have bicameral legislatures, but one (Nebraska) has a unicameral legislature. State legislatures vary widely in number of representatives, the length of their terms, and whether term limits are imposed.

Terms of governors are for different numbers of years. States may or may not have certain positions such as lieutenant governors or treasurers, and some positions, such as the state official responsible for education, may or may not be an elected position.

State election practices also differ widely because states face different issues and challenges in achieving the goal of strong voter participation. Some states allow voter registration on-the-spot on election day; others set earlier registration deadlines. Some states allow mail-in voting and early voting opportunities before the traditional election day; others do not. States are in a good position to decide, based on such factors as their traditions, and the location and number of voters, how to achieve the goal of meaningful voter participation. Because of their intimate familiarity with their unique government systems and political cultures, states and their citizens have special insight on how to ensure that their systems remain republican in form and practice. And to protect and maintain truly representative democracies, states must be allowed to serve as testing grounds. *See New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is especially true where liberty interests and the goal of representative government are at stake. Reasonable campaign finance strategies that fit the circumstances, goals, and needs of that state are entitled to deference by the courts, including this Court.

This deference is especially warranted where, as here, campaign finance laws were not enacted to handicap challengers. In adopting the expenditure limits at issue, the Vermont legislature responded to a groundswell of strong public policy arguments made by citizen groups. Vermont's response included higher spending limits for challengers than for incumbents, refuting the notion that the limits were designed to entrench current officeholders. Moreover, there

is evidence that mandatory spending limits do not insulate incumbents from successful challenge. *See* Tr. X-88 (Donald Gross) (stating that no mayoral incumbent won re-election while Albuquerque campaign spending law was in effect).[5]

B. A Republican Form of Government Depends Upon Deliberation and Political Participation.

Vermont's reasoning in favor of expenditure limits is not a pretext to insulate incumbents, but represents a genuine effort to preserve that state's republican form of government. "[T]he distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891); *see also The Federalist No. 14*, at 100 (James Madison) (Clinton Rossiter ed., 1961) ("[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives."). The power in the republic rests in its citizens, who bear ultimate responsibility for how the government is administered, while elected officials, for their part, are responsible for acting in the interest of those they represent. *See Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Representative government is rooted in this mutually dependent relationship between elected officials and their constituents. That relationship in turn depends on public participation and deliberation (both by representatives and citizens). Elected officials have a responsibility to determine through vigorous debate and analysis the best interests of

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[5] "Tr." refers to the trial court transcript, which was filed in-full as part of the record before the Second Circuit; "Ex." refers to trial exhibit volumes also filed as part of the record below.

their communities. Officials should aspire not simply to aggregate preferences from various interests, but to deliberate public issues actively and determine the best course. The Founding Fathers contemplated this deliberative ideal: "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs." *The Federalist No. 71*, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Representatives are charged with making decisions based on what they believe is right. In the campaign finance context, this Court has held that officeholders must be free from "undue influence" on their judgment, *see FEC* v. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. 432, 441 (2001), so that they can deliberate and decide issues "on the merits." *See McConnell*, 540 U.S. at 153. It is legitimate for a state to conclude that expenditure limits facilitate legislating "on the merits" by improving policy debate.

In enacting expenditure limits, Vermont reached the reasoned conclusion, among others, that improved deliberation and participation must extend to the citizens who inform the debate about the community's best interest. Vermont believes, and rightly so, that political participation and deliberation is crucial to a republican form of government.[6] Indeed, without public participation, a state government is republican in name only. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) ("the constitutional order must be

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[6] Alexis de Tocqueville observed that "[w]hat is understood by a republican government in the United States is the slow and quiet action of society upon itself. It is a regular state of things really founded upon the enlightened will of the people. It is a conciliatory government, under which resolutions are allowed time to ripen, and in which they are deliberately discussed, and are executed only when mature." Alexis de Tocqueville, *1 Democracy in America* 435-436 (Phillips Bradley ed., Vintage Books 1945).

preserved by a strong, participatory democratic process"). In a republic, citizens are "participator[s] in the government of affairs," Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in *1 The Founders' Constitution* 142 (Philip B. Kurland & Ralph Lerner eds., 1987), and the burden rests squarely on them to debate those affairs and analyze "the relative merits of conflicting arguments." *See Bellotti*, 435 U.S. at 791; *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.").

Public participation is integral to republican government for at least two reasons. *First*, it improves policy outcomes by making decision-makers aware of diverse perspectives. Vermont understood that in order for a legislature, or any other decision-making body, to settle on the best policy, it must have before it a diversity of perspectives. A broader range of perspectives provides legislators with more alternatives from which to choose, and the broader range of views increases the likelihood that the strengths and weaknesses of competing alternatives will be exposed. In addition, a breadth of perspectives tends to remedy any undue influence on policy decisions produced by the most forceful participants, who threaten to drown out those with meritorious, but different, ideas.

Second, public participation enhances the legitimacy of representative government. People are more likely to submit to government directives — to obey laws and regulations, pay taxes, join the National Guard — if they have participated in deciding how to spend those taxes, commit that National Guard, and craft those laws. *See* Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* 10 (2004) ("The hard choices that public officials have to make should be more acceptable, even to those who receive less than they deserve, if everyone's

claims have been considered on the merits, rather than on the basis of the party's bargaining power.").

Participation that improves decision-making and enhances government legitimacy takes many forms: voting, public debate through letters or web logs, campaign contributions, water cooler discussions, association membership, and candidacy for elected office. But in recent years, scholars have warned of declining political participation and how it has shifted power to a select few and undermined the quality of debate. *See* Robert Putnam, *Bowling Alone* 31-47, 336-349 (2000); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life, in Civic Engagement in American Democracy* 498-506 (Theda Skocpol & Morris P. Fiorina eds., 1999). Realizing that the absence of participation was a threat to its republican form of government — Justice Brandeis warned that "the greatest menace to freedom is an inert people," *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) — Vermont fairly enacted expenditure limits to reverse the trend. Expenditure limits, as discussed below, bolster confidence in government, thereby increasing not only voting, but all manners of political participation.

III. THERE IS A FIRM BASIS FOR VERMONT'S CONCLUSION THAT SPENDING LIMITS AT THE STATE LEVEL BOLSTER THE REPUBLICAN FORM OF GOVERNMENT THROUGH PUBLIC INVOLVEMENT AND DELIBERATION.

The Vermont General Assembly found that campaign regulations in the form of expenditure limits enhance civic participation and voter deliberation — elements that it deemed critical to protect the integrity of its republican form of government. This is nothing new. This Court has recognized states' authority to regulate political campaigns to

promote and protect the integrity of their systems of government. *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (preventing actual and apparent corruption "directly implicate[s] 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'") (citations omitted). Vermont heeded that message in enacting Act 64. Ultimately, both legal precedent and empirical evidence support Vermont's finding that expenditure limits enhance civic participation and deliberation.

1. Expenditure limits increase civic participation and deliberation by preventing corruption or the appearance of corruption. Indeed, it is well-settled that citizens are less inclined to participate in a government that they deem corrupt. *See Nixon*, 528 U.S. at 390. Vermont understood this when it enacted the expenditure limits and concluded that "[c]itizen interest, participation and confidence in the electoral process is lessened by . . . expensive campaigns." 1997 Vt. Laws Pub. Act 64 (finding No. 10).

Empirical analysis of congressional elections demonstrates that voter turnout is the same or lower in response to higher spending. Tr. X-58 (Gross). In a national poll, two-thirds of voters believed spending limits would improve the honesty and integrity of elections. Ex. III, E-1042 (Gross Report). A separate study in Minnesota corroborated these findings: there, one-third of voters said that they are less likely to participate in the electoral process if they perceive that donors have more influence than non-donors. David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (1999).

2. Expenditure limits also increase public participation by helping to raise the level of competitiveness in electoral races. *See* American Political Science Ass'n.: Task Force on

Inequality and American Democracy, *American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 5 (2004). The limits facilitate more competitive elections by eliminating the singular importance of campaign fundraising.[7] With limits in place, challengers have a greater chance of competing with incumbents, who almost always have an advantage in raising money. *See generally Raising the Limits: A Bad Bet for Campaign Finance Reform.* Because close elections emphasize and turn on mobilization of individual voters, more people participate in close elections both as voters and grassroots organizers.

3. In addition to increasing the competitiveness of elections, expenditure limits broaden opportunities for citizens to participate as candidates for elected office, opening up elections to candidates with a wider range of viewpoints.[8] Without expenditure limits, incumbents will remain favorites in most elections in large part because of the ease with which they can raise funds and outspend opponents. An advantage based on the ability to raise campaign dollars discourages citizens from becoming challengers, particularly lower-income and lower-middle-income citizens. *See* 1997 Vt. Laws Pub. Act 64 (finding No. 1) ("Election campaigns for statewide and state legislative offices are becoming too expensive. As a result

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[7] In the 2004 election year, 97% of congressional candidates who raised more money than their opponents won their elections. U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform* 4, 24 (2006). Incumbents for House and Senate seats who ran for re-election were successful 98% and 96% of the time respectively, due in large part to out-raising opponents an average ratio of 4.1 to 1. *Id.*

[8] In evaluating public finance systems for political campaigns, one court explained that the electorate is "entitled to have presented to it for its evaluation and judgment candidates from all walks of life." *Bang* v. *Chase*, 442 F. Supp. 758, 764 (D. Minn. 1977).

many Vermonters are financially unable to seek election to public office."); Tr. IX-132 (Elizabeth Ready) (Unrestrained spending "precludes normal people, even people that have a lot of political experience, from getting into the running for lieutenant governor, governor, because who wants to go out and raise, . . . a hundred thousand, two hundred thousand, a half million dollars? . . . And quite frankly, who can amongst normal members of the public?"). Expenditure limits improve the opportunities for citizens to become successful challengers by reducing the importance of fundraising and personal wealth in favor of grassroots methods of campaigning that are accessible to all potential candidates. Vermont's actions to promote greater civic participation through campaign expenditure limits are reasonable and deserve deference from this Court.

4. Expenditure limits also create opportunities for greater deliberation among elected officials, thereby promoting a more republican government that thoughtfully considers the interests of a broader electorate. By eliminating the incentive to amass endless campaign dollars, expenditure limits reduce the dependence of elected officials on relationships with wealthy contributors. In a system of unlimited expenditures, the affluent are heard more loudly and clearly than their less affluent counterparts, and officials act on input from an artificially narrowed group of constituents. *See Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 441; *see also American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 6. But in a truly representative government, elected officials make decisions that consider the viewpoints and interests of all of their constituents. When the government fails to meet this goal, it has failed to be truly republican in form. Because expenditure limits eliminate the arms race for campaign dollars, they relieve the pressure on elected officials to aggregate the interests of affluent constituents without deliberating on the interests of

the less affluent. Campaign finance reforms, particularly expenditure limits, "democratize the influence that money can bring to bear upon the electoral process." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). Likewise, less time spent raising campaign dollars means more time to consider and deliberate upon proposed laws. Because candidates and elected officials are then able to form policies based on deliberation of varying perspectives, citizens are more likely to view the government as legitimate (or free of corruption as discussed above). This, in turn, fosters broader participation, building an upward cycle of participation and legitimacy.

5. Expenditure limits also increase participation and deliberation by protecting and promoting direct voter contact. This voter contact is a critical interest for the citizens of Vermont as a means of guarding the state's republican form of government. The political culture of Vermont is built on a longstanding tradition of town hall meetings and grassroots campaigning that for centuries has increased citizen deliberation and political discourse. These traditions, fostered and carried out by the people of Vermont, inform elected officials and candidates of the diverse interests of the state's electorate. The Vermont General Assembly has continuously sought to protect this interest through legislation. Pet. App. 101a-102a (citing nearly a century of efforts to safeguard Vermont's system of government through campaign finance reform legislation).

Elected officials have admitted that the need to raise unlimited campaign funds directly limits the time they spend interacting with the average voter and the time spent deliberating on the issues and perspectives of their constituents. *See* U.S. PIRG, *The Case for Limits on Campaign Expenditures*, at http://www.buckbuckley.com (last visited Feb. 7, 2006). The Vermont General Assembly

passed Act 64 to protect the political traditions of the state, and particularly the traditions that foster deliberation and participation. The Second Circuit found that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time with voters." *See* Pet. App. 135a-144a; Tr. X-62 (Gross) ("In some of the highest [spending] congressional races, there [are] suggestions that often money is spent on factors which are not directly related to voter mobilization efforts or campaign efforts."). It is therefore reasonable and sound for Vermont to conclude that candidates, faced with expenditure limits, will better utilize their time in the interest of the electorate and spend the limited campaign dollars far more effectively through lower-cost grassroots efforts and direct voter contact.

CONCLUSION

Vermont has a compelling interest in guaranteeing a republican form of government through bolstering voter engagement and participation in elections and enhancing the debate on public and electoral issues. That interest is of constitutional significance and suffices by any measure as a compelling state interest that outweighs the interest of candidates with ample funds to spend without limit. Because that interest is so strong, and is asserted by a state with its own constitutional responsibilities in the area of republican self-governance and elections, it warrants deference by this Court. For the foregoing reasons, the Court should affirm the Second Circuit's decision with respect to Vermont's expenditure limits.

Respectfully submitted,

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Nos. 04-1528, 04-1539, and 04-1697

In the

SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, et al., Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

VERMONT REPUBLICAN STATE COMM., et al., Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

WILLIAM H. SORRELL, et al., Petitioners
v.
NEIL RANDALL, et al., Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al., OUT OF TIME

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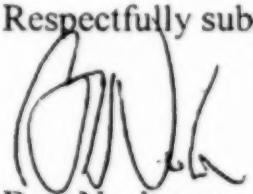
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Movants hereby request leave to file the accompanying brief *amici curiae* out of time. Pursuant to the Court's scheduling order, the brief *amici curiae* should have been filed on or before February 8, 2006. *Amici* inadvertently understood the filing date to be February 10, 2006, and filed their brief with the consent of the parties out of time on that date.

Respectfully submitted,



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